		(pp) (Entered: 09/19/2002)
09/25/2002	21	TRANSCRIPT taken on 9/19/02 of motion hearing (kb) (Entered: 09/27/2002)
02/28/2003	22	REPORT and recommendation by Magistrate Judge Wallace Capel Jr. that motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1] be granted and motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] be denied [EOD Date: 3/6/03] (RH) (Entered: 03/06/2003)
03/14/2003	23	OBJECTIONS by plaintiff to report & recommendation [22-1] with proof of service (ew) (Entered: 03/17/2003)
03/27/2003	24	ORDER by Judge Paul D. Borman accepting report & recommendation [22-1], granting motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1], denying motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] [EOD Date 4/1/03] (at)

		(Entered: 04/01/2003)
03/27/2003	25	JUDGMENT entered by Judge Paul D. Borman for defendant [EOD Date: 4/1/03] (at) (Entered: 04/01/2003)
04/25/2003	26	PROOF of service of notice of appeal (ew) (Entered: 04/28/2003)
04/25/2003	27	APPEAL by plaintiffs June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker of orders [24-1] and [25-1] to USCA - FEE: PAID - Receipt #: 486768 (lb) (Entered: 05/06/2003)
05/06/2003	28	PROOF of service of notice of appeal [27-1] to USCA and counsel of record (lb) (Entered: 05/06/2003)
10/07/2004	29	(Not Certified) ORDER from USCA re 27 Notice of Appeal - affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 10/07/2004)
12/09/2004	30	SLIP Opinion from USCA as to 27 Notice of Appeal filed by Keith Carabell, June Carabell, Harvey Gordenker and Frances Gordenker - affirmed. [Appeal Case Number 03-1700] (LBeh,)

		(Entered: 12/09/2004)
12/09/2004	31	APPEAL JUDGMENT from USCA as to 27 - affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 12/09/2004)
01/25/2005	32	MANDATE of USCA as to 27 Notice of Appeal filed by Keith Carabell, June Carabell, Harvey Gordenker and Frances Gordenker, affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 01/25/2005)
05/04/2005	33	LETTER from SC re 27 Notice of Appeal - petition for a writ of certiorari was filed and placed on the 4/15/2005 docket. [Appeal Case Number 04-1384] (LBeh,) (Entered: 05/04/2005)

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 03-1700
Filed: 6/6/03
Nsuit: 2863 Social Security: DIWC/DIWW
Carabell, et al v. US Army Corps Engr, et al
Appeal from: Eastern District of Michigan at Detroit

Case type information:
1) Civil
2) United States as party
3) civil rights

Lower court information:

District: 0645-2 : 01-72797
Trial Judge: Paul D. Borman, District Judge
Date Filed: 7/26/01
Date order/judgment: 4/1/03
Date NOA filed: 4/25/03

Fee status: paid

Prior cases:
None
Current cases:
None

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JUNE CARABELL — Timothy A. Stoepker
Plaintiff - Appellant — FTS 223-3598
313-223-3500
[COR LD NTC ret]
Paul R. Bernard
FTS 223-3598
313-223-3500
[COR ret]
Dickinson, Wright, PLLC
500 Woodward Avenue
Suite 4000 One Detroit Center
Detroit, MI 48226-3425

KEITH CARABELL — Timothy A. Stoepker
Plaintiff - Appellant — (See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

HARVEY GORDENKER — Timothy A. Stoepker
Plaintiff - Appellant — (See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

FRANCES GORDENKER — Timothy A. Stoepker
Plaintiff - Appellant — (See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

PACIFIC LEGAL FOUNDATION — M. Reed Hopper

Amicus Curiae FTS 419-7747
916-419-7111
[COR LD NTC ret]
Pacific Legal Foundation
3900 Lennane Drive
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Sacramento, CA 95834

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant - Appellee
Todd S. Kim
FTS 514-8865
202-514-2762
[COR LD NTC gvt]
U.S. Department of Justice
Land & Natural Resources Division
P.O. Box 23795

L'Enfant Plaza Station
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Laurel A. Bedig
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202-305-0331
[gvt]
U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986

Washington, DC 20026-3986

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant - Appellee

Todd S. Kim
(See above)
[COR LD NTC gvt]

Laurel A. Bedig
(See above)
[gvt]

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03-1700 Carabell, et al v. US Army Corps Engr, et al

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER

Plaintiffs - Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendants - Appellees

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03-1700 Carabell, et al v. US Army Corps Engr, et al

6/6/03 Civil Case Docketed. Notice filed by Appellant June Carabell, Appellant Keith Carabell, Appellant Harvey Gordenker, Appellant Frances Gordenker. Transcript needed: n (ert)

6/6/03 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 7/16/03 ; appellee brief due 8/18/03 ; appendix due 9/11/03; final briefs due 9/26/03 ; . (ert)

6/13/03 APPEARANCE filed by Attorney Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (jts)

6/23/03 APPEARANCE filed by Attorney Timothy A. Stoepker for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

6/23/03 APPEARANCE filed by Attorney Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

6/23/03 PRE-ARGUMENT STATEMENT filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

7/17/03 PROOF BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June

Carabell. Certificate of service date 7/16/03 Number of Pages: 46 (10018). [03-1700] (rgf)

7/17/03 Request to require oral argument filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (rgf)

7/23/03 APPEARANCE filed by Attorney M. Reed Hopper for Amicus Curiae Pacific Legal [03-1700] (ert)

7/23/03 BRIEF filed by M. Reed Hopper for Amicus Curiae Pacific Legal on behalf of the appellants. Copies 7. Certificate of service date 7/22/03 . [03-1700] "with consent" (ert)

7/25/03 Appellee MOTION filed to extend time to file brief (requesting 30 days). Motion filed by Todd S. Kim for the Appellees. Certificate of service date 7/24/03 . [03-1700] (dtk)

7/31/03 LETTER SENT by csmgr resetting briefing schedule: [03-1700] granting motion to extend briefing [2786511-1] filed by Todd S. Kim [03-1700] appellee brief now due 9/17/03 ; appendix now due 10/8/03 ; appellant final brief now due 10/29/03 ; appellee final brief now due 10/29/03 . (jts)

9/18/03 PROOF BRIEF filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 9/17/03 . Number of Pages: 56+(13322). [03-1700] (rgf)

9/18/03 Request to require oral argument filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (rgf)

10/7/03 PROOF REPLY BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell Certificate of service date 10/6/03 [03-1700] 14+++ pages. Final reply brief due 10/29/03 . [03-1700] (rgf)

10/9/03 APPENDIX filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell. Copies: 05 - 3 VOLUMES; 870 pages.. Certificate of service date 10/8/03 [03-1700] (rgf)

10/29/03 FINAL BRIEF filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Copies: 07. Certificate of service date 10/28/03 . Number of Pages: 57++(13274). [03-1700] (rgf)

10/29/03 Request to require oral argument filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (rgf)

10/30/03 FINAL BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June

Carabell. Copies: 07. Certificate of service date 10/29/03 Number of Pages: 46. [03-1700] (rgf)

10/30/03 Request to require oral argument filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (rgf)

10/30/03 FINAL REPLY BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell. Copies: 07 Certificate of service date 10/29/03 Number of Pages: 14. [03-1700] (rgf)

2/12/04 ADDITIONAL CITATION filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 2/11/04 [03-1700] (jts)

5/28/04 Oral argument date set for August 11, 2004 in court room 607. Notice of argument sent to counsel. [03-1700] (pjm)

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03-1700 Carabell, et al v. US Army Corps Engr, et al

8/9/04 ADDITIONAL CITATION filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 8/5/04 [03-1700] (jts)

8/11/04 CAUSE ARGUED on 8/11/04 by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell, Todd S. Kim for Appellee

EPA, Appellee US Army Corps Engr before Judges Batchelder, Gibbons, Stafford. [03-1700] (kal)

9/27/04 OPINION filed : AFFIRMED the district court's decision granting summary judgment to the defendants. [03-1700], decision not for publication pursuant to local rule 28(g) [03-1700] . Alice M. Batchelder, Circuit Judge, Julia S. Gibbons, Circuit Judge, William H. Stafford, Authoring, District Judge (N/FL). 11/15/04 designated FOR PUBLICATION (jts)

9/27/04 JUDGMENT : AFFIRMED . (jts)

10/12/04 Appellee MOTION filed to publish court's decision . Motion filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 10/8/04 . [03-1700] (jts)

11/15/04 ORDER filed granting the appellees' motion to publish the court's decision. [03-1700] Alice M. Batchelder, Julia S. Gibbons, Circuit Judges; William H. Stafford, District Judge. (stb)

11/15/04 TENDERED : petition for rehearing en banc which is three days late from Paul R. Bernard for Appellants Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [03-1700] (blh)

11/23/04 PETITION for en banc rehearing filed by Paul R. Bernard for Appellants Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell. Certificate of service date 11/12/04. [03-1700] (blh)

1/10/05 ORDER filed denying petition for en banc rehearing [3063145-1] filed by Paul R. Bernard [03-1700]. Alice M. Batchelder, Julia S. Gibbons, Circuit Judges; William H. Stafford, District Judge. (blh)

1/18/05 MANDATE ISSUED with no cost taxed [03-1700] (rgf)

4/19/05 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant June Carabell, et al. Filed in the Supreme Court on 04-11-05 , Supreme Ct. case number: 04-1384 . [03-1700] (swh)

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03-1700 Carabell, et al v. US Army Corps Engr, et al

10/18/05 U.S. Supreme Court letter filed granting petition for writ of certiorari [3145665-1] filed by June Carabell Supreme Court No. 04-1384 [03-1700] Case is consoliated with Sup. Ct. No. 04-1034 and a total of one hour is allotted for oral argument. . Filed in the Supreme Court on 10-11-05 . (swh)

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STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 301, Inland Lakes and Streams, and Part 303, Wetland Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of June and Keith Carabell and Frances and Harvey Gordenker

File No. 93-14-602

PROPOSAL FOR DECISION

Richard A. Patterson Administrative Law Judge

DATED: August 12, 1998

This case involves the Department of Environmental Quality's (Department) denial of a permit application filed by June and Keith Carabell and Frances and Harvey Gordenker (Petitioners). The permit application proposed to place fill in a regulated wetland in order to facilitate the construction of a housing development.

The application for a permit was filed under the provisions of Part 303, Wetland Protection, of Natural Resources and Environmental Protection Act (NREPA). Although the case is captioned to include consideration of Part 301, Inland Lakes and Streams, of NREPA, there is no anticipated activity, nor was there any evidence presented as to impacts on the Sutherland

Oemig Drain adjacent to the subject parcel. Therefore, an analysis of the proposed activity under the criteria of Part 303 is unnecessary.

On March 30, 1994 a petition for contested case hearing on the denial was filed with this Tribunal. Upon the request of Parties, the case was held in abeyance to facilitate informal settlement negotiations. While the case was held in abeyance written Status Reports were periodically filed with this Tribunal, the last of which, dated May 23, 1997, had the Petitioners reporting an impasse in the negotiations and requesting a hearing be scheduled. A pre-hearing conference was conducted on July 17, 1997, to prepare the case for hearing. A contested case hearing was conducted in this matter on October 27, 28, 29 & 30, 1997, January 27, 28, 29 & 30, 1998, and February 2, 1998. The Parties filed post-hearing briefs and proposed findings of fact and conclusions of law. Those filings have been reviewed and utilized to the extent they accurately reflect the record and the law. Proposed Findings and Conclusions not addressed were either found to be unsupported by the record or unnecessary in preparing this Proposal for Decision.

JURISDICTION

The hearing was requested under the provisions of Part 303, Wetland Protection, of NREPA, MCL 324.30301 et seq.; MSA 13A.30301 et seq., and the administrative rules, and was conducted pursuant to the provisions of the Michigan Administrative Procedures Act, MCL 24.201 et seq. ; MSA 3.560 (101)et seq.

The Department suggests this case should be held in abeyance pending resolution of a Motion for

Reconsideration of a recent order of the Michigan Supreme Court in Friends of the Crystal River v. Kuras, et al., Mich ____; 577 NW2d 684 (March 31, 1998). This Tribunal is not inclined to grant that request in that the essence of the motion addresses a sophisticated and esoteric issue over a set of unusual circumstances involving the interplay of state and federal regulation. Furthermore, to further delay a decision in this case, which has been pending since March 30, 1994, based on a decision by the Supreme Court which will not resolve the contested issues is unfair and prejudicial to the Petitioners.

The Department has also expressed concern over the Petitioners reliance on the reasoning of Administrative Law Judge (ALJ) William C. Fulkerson and the Michigan Court of Appeals in Kuras regarding the burden of proof, the required analysis of Part 303 criteria and the interpretation of the meaning of feasible and prudent alternatives. While the Supreme Court declared in Kuras that the " . . . decisions of the ALJ and the MRC are declared to be of no precedential force and effect", the Order is clearly aimed at the issue of jurisdiction or to issue a permit, as opposed to the underlying reasoning expressed. That reasoning, involving the existence or non-existence of feasible and prudent alternatives, is. persuasive, if not precedential

PARTIES

Mr. and Mrs. Keith Carabell and Mr. and Mrs. Harvey Gordenker are the applicants for a permit pursuant to Part 303 and are represented by Timothy A. Stoepker, Esq. The professional staff of the Michigan Department of Environmental Quality is charged with the day-to-

day implementation of Part 303. The Department is represented by Elaine Dierwa Fischhoff , Assistant Attorney General .

At the hearing the Petitioners presented five (5) witnesses: Mr. Keith Carabell; Mr. Robert Leighton, Land Planner and Wetlands Consultant; Mr. Patrick Meagher, C. P., Urban Planning Consultant to Chesterfield Township; Mr. Bernard C. Sieber, P.E., Real Estate Development Engineering Consultant and Mr. Jack Hernandez, Jr., Macomb County Real Estate Broker.

The Department presented six (6) witnesses: Mr. Barry Horney, DEQ, Southeast Michigan District Supervisor; Mr. Ernie Kafcas, Department of Natural Resources, Wildlife Biologist; Mr. Kurt Childs, DEQ, Land and Water Management Analyst; Mr. Rob Zbiciak, DEQ, Land and Water Quality Manager; Mr. Don Gunning, President, Lake St. Clair Advisory Committee; and Mr. Jason Horton, Esq., Attorney and Real Estate Developer. Mr. James Piggush, Assistant Attorney General, testified with respect to a Motion to Disqualify Mr. Mark Thomas as a witness for the Petitioners. However, Mr. Thomas was withdrawn as a witness previous to a ruling on the motion.

The Petitioner introduced twenty six (26) exhibits, which are labeled numerically. The Department introduced twenty five (25) exhibits, which are labeled alphabetically. A list and description of these exhibits is attached to this Proposal for Decision

STIPULATIONS ON THE RECORD

At the commencement of the hearing the Parties entered into the following stipulations:

1) The Petitioners are proper applicants for a permit.
2) The activity proposed in the application is regulated.
3) A permit is necessary.

I find these stipulations are legally correct, and I adopt them as findings. Stipulations entered into by the parties shall be used as evidence at the hearing and are binding. MCL 24.278; MSA 3.560 (178); Dana Corporation v. Employment Security Commission, 371 Mich 107, 110 (1963).

FINDINGS OF FACT
PROCEDURAL HISTORY

The subject parcel was the subject of an application filed in 1987 by Seminole Investment Company, under a purchase agreement with the Petitioners, which proposed to excavate the site and build a 200 unit condominium complex. A permit for that activity was denied by the then Michigan Department of Natural Resources and not administratively contested.

A lawsuit alleging the 1987 denial constituted a takings, and requesting compensation, was filed by the Petitioners in the Michigan Court of Claims, which subsequently dismissed the action. The Michigan Court of Appeals upheld the dismissal, stating that while the Petitioners had established that one profitable use of the property had been denied, they had not applied for or explored other proposals which may be economically feasible. Carabell et. al. v Michigan Department of Natural Resources, 191 Mich. App. 610; 478 NW2d 675

(1991). The Michigan Supreme Court denied leave. Id., 439 Mich 980; 483 NW2d 858 (1992).

The present application for permit was filed on June 10, 1993. Additional information was requested by the Department on July 21, 1993 and supplied on November 29, 1993. The application was then deemed administratively complete and public noticed on December 2, Adverse comments were received from the Lake St. Clair Advisory Committee and the U.S. Fish and Wildlife Service. Mr. Kurt Childs inspected the site and prepared a Project Review Report on February 8, 1994. Exhibit D-P. In the denial letter the Department suggested further revision of the project and requested the Petitioners submit a modified proposal. On April 27, 1994, subsequent to the filing of the petition for contested case hearing, Mr. Childs revisited the site and prepared a second Project Review Report which located available upland consisting of an area approximately 100 by 240 feet. Exhibit R-R. He had previously visited the site and prepared a Project Review Report. Exhibit R-P.

LOCATION AND NATURE OF THE SUBJECT PROPERTY

The subject parcel is located in Chesterfield Township, Macomb County, Michigan. The property consists of 19.6 acres, of which 15.96 acres are wetlands. The parcel is triangular in shape and fronts on Donner Road on its westerly border. The hypotenuse of the triangle runs from the southwesterly corner of the parcel at a 45 degree angle to the northeast corner and is separated from the. adjacent property by the Sutherland-Oemig Drain. The northerly border abuts a multi-family

residential development. The upland on the property is adjacent to the west and southeast perimeters.

The Petitioners originally proposed to excavate 28,000 cubic yards of soil and to construct a 130 unit town house complex on the parcel. Exhibit D-0. During the pendency of this case the Petitioners submitted two (2) revised proposals depicted in Exhibits P-78 and P-79, both of which entail the construction of 112 units, reducing the amount of wetland involved to 12.2 acres. Exhibit P-78 involves preservation of 3.74 acres of wetland, while Exhibit P-79 involves wetland enhancement of the same acreage. The Department contends a development of 24 units on the upland fronting Donner Road, with some intrusion into the wetland, is a viable alternative to the activity proposed in the permit, or the subsequent proposals. Therefore, the analysis under Part 303 must focus on whether the activity proposed in the permit application, the Petitioner's subsequent proposals, or the Department's alternative are allowable under the statutory criteria.

TESTIMONY ON THE RECORD

As previously discussed, the Parties stipulated to the presence of regulated wetland on the subject parcel. With that stipulation, Part 303, specifically section 30311, next requires the following criteria be reviewed for each permit application and mandates findings be made with regard to each criterion.

(1)A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived

from the activity, and that the activity is otherwise lawful.

A determination of whether the project is in the public interest is made by applying criteria discussed in Part 303. The Parties have stipulated a permit is necessary and I have adopted that as a Finding of Fact.I further find, as a Matter of Fact, the proposed activity is otherwise lawful.

(2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment and destruction. The following general criteria shall be considered:

(a) The relative extent of the public and private need for the proposed activity.

Mr. Patrick Meager, in his capacity as an urban planning consultant, testified to a need for 150 senior citizen residences in Chesterfield Township. The demographics of the Petitioners' proposals were not specified, but testimony was elicited that the property is zoned RM-3 , which allows for the proposed use and that it is consistent with the master plan. The record also reflects a letter from Chesterfield Township dated November 6, 1987, which encouraged the approval of the original multi-family proposal: Exhibit P-21. There would appear, therefore, to be a public need for the proposed activity.

Similarly, the record indicates a private need for the proposed activity. There was a great deal of testimony regarding the Petitioners having to develop the property in some fashion so as to realize a return on their investment.

(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

There would not appear to be any available alternative locations for the proposed activity. The immediate area is fully developed. Mr. Meagher testified there did not appear to be any undeveloped property in Chesterfield Township which is zoned to accommodate Petitioners' multi-family proposal, with the exception of a parcel located north of 21 Mile Road and west of 1-94. There was no evidence addressing the characteristics of that site, or its availability. Based on the foregoing, I find, as a Matter of Fact, there is no feasible and prudent alternative location available.

The issue of feasible and prudent alternative methods is much more complex. The 1987 application contemplated filling in the entire wetland to facilitate the construction of 200 residential units. The 1993 application initially requested 130 units, which was subsequently revised to 112 units, with alternative provisions for preservation. or enhancement of the remaining wetland. Preservation essentially entails maintaining, or restoring the area outside the developed envelope to its natural state, in this case wetland. Enhancement involves dredging to varying depths and planting of diverse plant species to improve the quality, function and aesthetics of the wetland. Both

of the 112 unit proposals involve the installation of a detention pond, as well. The Department is insistent on mitigation in response to those proposals, or in the alternative, a much smaller project involving 24 units adjacent to Donner Road.

Based on the foregoing, there are three alternatives before this Tribunal:

1. 112 units with preservation.
2. 112 units with enhancement
3. The Department alternative of 24 units.

Each of these alternatives will be addressed separately. However, because the Department is insistent on mitigation in response to proposals 1 and 2, that issue will be addressed first.

1988 ARCS, R 281.925 provides for mitigation and addresses the necessary determination in this regard. Under subsection (4) (c) it must be determined "[T]hat it is practical to replace the wetland resource values which will be unavoidably impacted". The rule does not quantify the amount of wetland to be created through mitigation to compensate for the loss. However, Mr. Horney testified, as a general rule, the Department requires mitigation in the amount of 1 1/2 times the amount of wetland lost. However, this "general rule" is not binding and each application must be reviewed on its merits; including the necessity for mitigation and the ratio.

Proposals 1 or 2 would result in 12.2 acres of wetland being lost, which computes to a required mitigation of 18.3 acres under the Department's "general rule". Both

Mr. Robert Leighton and Mr. Bernard Sieber estimated the cost of land acquisition and creation of new wetland to be $45,000 to $50,000 an acre, which computes to a mitigation cost of $823,000 to $915,000 for Proposals 1 or 2.

The Leighton/Sieber calculations were disputed by Mr. Jason Horton. First, he opined that land which is undevelopable, and presumably available because it is either too small, contaminated, or land-locked, could be purchased for a little as $5,000 an acre. However, no specific sites were put forth, and the availability and desirability of property which meets these specifics is questionable. he also disputed the figure of $13,000 an acre for planting vegetation built in to the Leighton/Sieber estimate, stating it could be accomplished for $2,000 an acre. Lastly, he believes the figure of $13,000 an acre for excavation is too high in that it is based on going to a depth of 2 1/2 feet, which is unnecessary. He has seen wetland mitigation accomplished by excavation to a depth of 1 foot, reducing that cost by approximately $4,000 an acre. Mr. Horton testified a total mitigation cost of approximately $11,000 an acre is more accurate, which for Proposal 1 or 2 equates to slightly over $200,000.

In addition, Mr. Rob Zbiciak testified to the possibility of. a statewide wetland mitigation banking program being implemented in the future. However, this testimony is speculative and has no probative value.

As stated in R 281.925, in order for mitigation to occur, there must be a finding it is practical. The American Heritage College Dictionary (1993), as applicable in this context, defines practical as:

"Of, relating to, governed by, or acquired through practice or action, rather than theory, speculation or ideals."

As discussed above, the record in this matter as it pertains to mitigation can fairly be characterized as theoretical and speculative. Therefore, a finding that mitigation is practical under R.281.925 is not possible.

Regarding the Department's proposal of 24 units on the edge of the property fronting Donner Road, Mr. Sieber estimated a loss to the Petitioners of $18,486 per unit with mitigation at 11/2 times the lost wetland, or $8,027 with on site wetland enhancement. Transcript 1/27/98, pg. 88. Additionally, if neither mitigation or enhancement were required there would still be a loss per unit under the Department's proposal. Transcript 1/27/98 pg. 9-1.

Conversely, Mr. Horton testified that a return of over $48,000 per unit could be possible, exclusive of land costs. Transcript 1/30/98, pg. 156. However, Mr. Horton did not consider architectural or construction management fees, and be utilized substantially lower building costs per square foot than did Mr. Sieber. There is also a question as to the proper method of calculating debt service. There is, therefore, a question whether the Department's proposal is economically viable, which despite Mr. Horton's testimony, would appear doubtful. Although Mr. Horton has considerable experience in the field, many of his assumptions were based on larger projects located outside of Macomb County which were not necessarily comparable in size or price to the instant project. However, both Mr. Sieber and Mr. Jack Hernandez based their testimony

on whether there exists a feasible and prudent alternative to the proposed activity on local market conditions.

It is obviously not possible to precisely project profitability or lack of it on the testimony presented. But the issue to be considered is the existence of a feasible and prudent alterative. In that regard, the 24 unit project is feasible in the sense that it can physically be accomplished. Whether or not it is prudent in an economic sense is doubtful.

Of the two alternatives proposed by Petitioners, the second involving enhancement is clearly more prudent. This is true because, as Mr. Leighton testified, the existing wetland is of minimal value, and while the proposed project would permanently remove a majority of it, the enhancement area, if done properly, would greatly increase wetland function in that area. He also testified enhancement would significantly improve water quality by filtering runoff before it went into the drainage system and would provide greater diversity of plants and wildlife. Aesthetics, in his opinion, would also be improved. Transcript 10/28/97, pg. 397.

The history of this case demonstrates a significant downsizing of the project from the initial application, for 200 units utilizing all of the wetlands to the current proposal involving 12.2 acres of the 15.96 acres of wetland, with enhancement or creation of 3.74 acres of wetland. Exhibit P-79. This alternative is obviously feasible and, as discussed above, is also prudent.

Based on the above analysis, I find, as a Matter of Fact, a feasible and prudent alternative to the activity

proposed in the application for a permit is the placement of fill in 12.2 acres of wetland to facilitate the construction of 112 residential units with enhancement of the remaining 3.74 acres of wetland.

(c) The extent and permanence of the beneficial or detrimental effects which the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

Mr. Leighton testified the wetland does not provide any beneficial effect on the surrounding public and private uses. This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents discharge of water both to and from the site, and the Sutherland-. Oemig Drain is bermed, which prevents the discharge of water either into it or from the drain. Mr. Leighton characterized the site as being tantamount to a bath tub, in that the only water coming onto and being retained on the parcel is from rainfall. Due to the presence of clay soils on the site it is not permeable and ground water neither runs from or onto the site.

The Department did not refute this testimony, but did offer the testimony of Mr. Zbiciak that, "there is nothing in the statue that allows us to define something as a marginal wetland. It either meets the definition of a wetland based on the statute or it does not." Transcript 1/27/98, pg. 119. However, "this is a legal opinion and is inaccurate. While Part 303 does not qualify wetlands, they are either regulated or they are

not, the legislature requires findings regarding the benefit the wetland provides when reviewing a permit application.

Mr. Kurt Childs testified regarding what are general concerns over losing virtually all of the subject wetland and cumulative impacts which may result. However, he essentially agreed with Mr. Leighton as to the soil composition on the site. Although Mr. Childs determined the presence of Toledo soils through the county soil survey, he described that soil as "slightly more permeable than straight clay.". Transcript 1/28/98, pg. 32. He agreed with the U.S. Fish and Wildlife Service's concerns over habitat loss, but did not have sufficient information regarding whether the wetland was serving to protect subsurface water or acting to recharge groundwater. In addition, he could not testify that the wetland was acting as a biological and chemical oxidation basin. He "guessed" it may trap sediments in the event of an overflow of the adjacent drain. Transcript 1/28/98, pg. 36.

Based of the above testimony, the benefits provided by a wetland: flood and storm control; protection of subsurface water resources; pollution treatment; erosion control and sources of nutrients would not be effected by the proposed activity. As noted later under the analysis of subsection (e) fish are not .present and wildlife and wildlife habitat are not significant considerations.

The proposed wetland enhancement will serve to improve the value of the area, but will not replace the wetland as it currently exists on an acre for acre basis. However, as previously discussed the record fails to

establish that the value of the wetland on the site as it presently exists is substantial, but rather it demonstrates the wetland has, at best, very limited functional value. This criteria requires a balancing of the beneficial and detrimental effects of the uses, including the wetland uses. The balance as to the proposed use of this site favors the proposal of the Petitioners for wetland enhancement.

I have previously found the Petitioners proposed use with wetland enhancement is one to which the property is suited under an economic analysis and under local land use planning. Additionally, I find, as a Matter of Fact, the benefits for both private and public use will be substantial, the impact will be long term and the physical impact on the property, specifically the, loss of whatever values the 12.2 acres of wetland provides, will be permanent. However, I further find, as a Matter of Fact, the wetland currently provides little benefit and the proposed wetland enhancement will provide greater benefit than any detriment resulting from the loss of 12.2 acres of wetland.

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activi-ties in the watershed.

But for the subject parcel, the immediate surrounding area is virtually fully developed. There will, therefore, be little if any further activity in this area of the watershed. As stated previously, although the parcel is adjacent to the Sutherland-Oemig Drain, which ultimately flows into Lake St. Clair, there is not a surface water connection to the drain. Therefore, I find, as a Matter of Fact, there will no impact on the

watershed, which is the wetland as it currently exists, by the proposed activity.

(e) The probable impact on recognized historic, cultural, scenic, ecological or recreational values and on the public health or fish or wildlife.

There is no evidence on the record addressing historic, cultural values or any impact on the public health. Scenic values are subjective and nebulous, as borne by the fact the Department prefers the scenic value of the pristine wetland and the Petitioners, as well and Chesterfield Township officials., (Exhibit P-21), would prefer the site be developed. Fish are not a factor as none are present or this site.

The site is predominantly forested wetland and the lack of any significant understory in the interior, which is necessary in providing cover and food supply, undermines wildlife value. The only significant understory is located on the perimeter (Robert Leighton, 10.,29/97, page 532) which would not be significantly disturbed under any proposal. Mr. Leighton observed only a rabbit and a few possible groundhog burrows on the parcel, and the presence of song birds, but no waterfowl. According to the testimony of Mr. Ernie Kafcas, the site is currently conducive to migration of water fowl and other neo-tropical bird species . He further stated the property would be conducive for certain reptiles and amphibians, as well as suburban type mammals such as raccoon and rabbit.

Based on the foregoing, I find, as a Matter of Fact, wildlife value of the site is minimal. I further find, as a

Matter of Fact, the proposed project's probable impact on the other criteria would be de minimus.

(f) The size of the wetland being considered.

The wetland on the subject property consists of 15.96 acres. Exhibit P-32. The Petitioners' revised proposals would each impact 12.2 acres. The Department's alternative would involve the placement of fill in approximately 2 to 4 acres of wetland.

(g) The amount of remaining wetland in the general area.

The area is fully developed and, therefore, there is virtually no remaining wetland. As previously discussed, the Petitioners' revised proposals would eliminate 12.2 acres out of 15.96 acres, leaving 3.76 acres of wetland on the subject parcel. The Department's proposal would eliminate 2 to 4 acres of wetland, leaving approximately 13 acres.

(h) Proximity to any waterway.

Although the parcel is adjacent to the Sutherland Oemig Drain, it is not connected to the facility. The parcel is isolated from any other water body by land on all sides. Although the distance was not quantified the parcel is a substantial distance from Lake St. Clair.

(i) Economic value, both public and private, of the proposed land charge to the general area.

The economic value of the parcel would be greatly enhanced from the perspective of the public as well as

the Petitioners. The Petitioners would, if allowed to develop the property, realize a return on their investment and the township would benefit from a substantial increase in its tax base, which would outweigh any increased costs of services. Those involved in the construction and marketing of the development would also receive income from the project.

(3) In considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.

There have been no findings of other state agencies.

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

(a) he proposed activity is primarily dependent upon being located in the wetland

(b) A feasible and prudent alternative does not exist.

The criteria to be considered pursuant to MCL 324.30302 (b)(i) through (vi) would not be materially adversely effected by the activity proposed in Exhibit P-79. Furthermore, for the reasons previously stated, said activity will not result in an unacceptable disruption to the aquatic resources.

The available upland on the site is too small to accommodate the proposed activity and it cannot be accomplished without impacting the wetland to some extent. Therefore, the proposed activity is dependent upon being located in the wetland. This Tribunal has previously found that a feasible and prudent alternative exists to the activity proposed in the permit application and the Department's proposal.

CONCLUSIONS OF LAW

1. I conclude, as a Matter of Law, based on the stipulation of the Parties, the subject site is comprised of regulated wetland and a permit is required pursuant to Section 30304(a) and (b) of Part 303 of NREPA.

2. I conclude, as a Matter of Law, based on the stipulation of the Parties, the application for a permit was processed in a procedurally proper manner and June and Keith Carabell and Frances and Harvey Gordenker are the proper Petitioners in this matter.

3. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit P-79 is in the public interest.

4. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit P-79 will not cause an unacceptable disruption to aquatic resources.

5. I conclude, as a Matter of Law, the proposed project as depicted in Exhibit P-79 is wetland dependent.

6. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit--P-7.9 is otherwise lawful.

7. I conclude, as a matter of Law, there is feasible and

prudent alternative to the activity proposed in the application for a permit, specifically placement of fill in the wetland to facilitate the construction of 112 residential units with wetland enhancement as depicted in Exhibit P-79.

PROPOSAL FOR DECISION

Based upon the Findings of Fact and Conclusions of Law, it. is proposed that a Final Order be issued permitting the placement of fill on the subject parcel to facilitate the construction of 112 residential units with wetland enhancement as depicted in Exhibit P-79.

Dated: August 12, 1998

Richard A. Patterson Administrative Law Judge

RE: Part 303 Wetland Protection and Part 301 Inland Lakes & streams of the Natural Resources and Environmental Protection Act (NREPA) , 1994 PA 451, as amended.

Petition of June & Keith Carabell and Francis & Harvey Gordenker

File No. 93-14-602

EXHIBITS

Respondent's Exhibits

A Tax Statement for 1969, Township of Chesterfield, due December 1st, No. 776, page 132.

B Letter dated February 22, 1994, from Kurt Childs, Analyst and Barry J. Horney, District Supervisor, Livonia, Michigan Department of Natural Resources (DNR), Land & Water Management Division (LWMD) to June Carabell, Keith Carabell, Harvey Gordenker, and Frances. Gordenker.

C Letter dated September 26, 1996, from Elaine Dierwa. Fischhoff, Assistant Attorney General (AAG) , Natural.. Resources Division (NRD), Livonia to Timothy A. Stoepker, Abbott, Nicholsori, Quilter, Esshaki & Youngblood., P.C.

D Letter dated July 17, 1996, from Timothy Stoepker to Jeremy M. Firestone, Esq., AAG, NRD.

E Letter dated October 31, 1956 from Timothy A. Stoepker to Elaine Dierwa Fischhoff.

F Ordinance No. 110, Zoning Ordinance Charter Township of Chesterfield, Macomb, Michigan, Published by The Bay Voice, September 11, 1996.

G Wetland Permit Application: Carabell, Leslie and Company Residential Development, Chesterfield Township, Michigan, June 1993.

H Letter dated June 25, 1993, from Jane A. Prochaska, Robert Leighton Associates, Land Design to Les Thomas, MDNR, LWMD-PCU.

I Letter dated November 17, 1993, from Jane A. Prochaska, Robert Leighton Associates, Land design to Sally Stoll, MDNR, LWMD-DCU.

J Copy of The Charter Township of Chesterfield Zoning Ordinances, not current.

K Letter dated September 14, 1987, from Edward W. Pratt, Partner, Wake-Pratt Companies to DNR, Attention Harry Horney.

L Project Review Report on application number 87-14-963W, signed by Robert P. Zbiciak, Water Quality Specialist, LWMD on December 10, 1987.

M Interoffice Communication dated March 28, 1988 to File No. from Robert P. Zbiciak.

N Interoffice Communication dated March 25, 1988 to Rob Zbiciak from Ernest Kafcas, Wildlife Habitat Biologist.

O Letter dated March 4, 1994 from Robert Perciasepe,

Assistant Administrator, United States Environmental Protection Agency to Roland Harmes, Director," MDNR.

P Project Review Report on application number 93-14-602, signed by Kurt Childs, dated February 8, 1994.

Q Letter dated February 22, 1994 from Kurt Childs, Analyst and Marry j. Horney, District Supervisor, Livonia, Michigan DNR, LWMD to June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker.

R Project Review Report on application number 93-14-.602, signed by Kurt Childs, dated April 27, 1994.

S Draft Interoffice Communication from Kurt Childs to Elaine Dierwa Fischhoff .

T Notebook paper drawing, 8 1/2" x 11".

U Photo copy of a plan with Sieber notations on sewer and water.

V Photo copy of a plan.

W Donner Road Condominiums, Engineer's Preliminary Cost Estimate, Job No. 97-096, dated January 12, 1998.

X Notebook paper drawing, 81/2" x 11".

Y Preliminary Proforma Projections (24 Stacked Ranch Concept), January 29, 1998.

Plaintiff's Exhibits - all Photocopied

1 Resume of Robert C. Leighton, Principal.

3 Land Contract, made on March 28, 1969 between Zenith Steel & Metal Co., James A. Michael, Joseph Michaels and Charles R. Towner and Robert Piersl, Keith A. Carabell, Stanton P. Bockner, Harvey Gordenker and Robert Palmer.

5 Warranty Deed dated July 5, 1971, liber 2662, page 471.

16 Agreement of Sale, Offer to Purchase Real Estate, Accepted Offer Dated 07/08/87, Investment Co., a Michigan Co-Partnership.

18 Offer of Purchase of Real Estate signed by Edward W. Pratt and Harvey Gordenker, Edward W. Pratt, Purchaser in March, 1987 with attachments.

21 Letter dated November 6, 1987 from, James H. Rollard, Supervisor, Chesterfield Township to the State of Michigan Department of Natural Resources on File No.87-14-953W.

23 Certified Letter dated December .30, 1987 from Robert J. Hornet, District Supervisor, Land & Water Management Division (LWMD) , Department of Natural Resources (DNR) to Semirole Investment Company.

24 Memorandum dated January 20, 1993 from Ashok K. Punjabi, District 10 Headquarters, LWMD.

27 Wetland Permit Application: Carabell, Leslie and Company, Residential Development, Chesterfield Township, Michigan, June 1993.

31 Letter dated December 17, 1993 from Donald gunning, Vice-Chairperson, MUCC Wetlands Watch to Barry Horney, Land Resource Programs Supervisor, DNR.

32 Public Notice dated December 2, 1993 on File No. 9314-602 from the DNR, LWMD.

35 Letter dated January 14, 1994 from Charles M. Wooley, Field Supervisor, United States Department of the Interior., Fish and Wildlife Service to the Wetlands Coordinator, U.S. Environmental Agency, Wetlands and Watersheds Section P (WQW-16J).

39 Two-page review of facts and information found pertinent to making a decision on application for permit number 93-14-650, dated 02/17/94 by Kurt Childs.

57 Interoffice Communication dated May 31, 1994 from Ernie Kafcas, Wildlife Habitat biologist, District 10, DNR to Kurk Childs, LWMD, District 10, DNR.

71 Interoffice Communication from Kurk Childs to Barry Horney, comments on applicant's letter dated 10/31/96.

75 Fourteen pages, beginning with Sec. 1201. Minimum Site and Building Requirements, 15.371 (Rev. 11/90).

76 Zoning/Location Map, Wetland Map, Chesterfield Township, Macomb County, Michigan, Planner: Robert

Leighton Associates, Inc.

77 Zoning/Location Map, Site Data, Preliminary Site Plan (Multi-Family Attached Townhomes), Planner: Robert Leighton Associates, Inc.

78 Zoning/Location Map, Site Data, Preliminary Site Plan B (Multi-Family Attached Townhouses) , Planner: Robert Leighton 79 Zoning/Location Map, Site Data, Preliminary Site Plan A (Multi-Family Attached Townhomes), Planner: Robert Leighton Associates, Inc.

80 Zoning Map, Chesterfield Township, Macomb County, MI, Township Planning Commission.

81 Chesterfield Charter Township, Master Plan.

81b Black and White Aerial Photograph, Chesterfield Charter Township.

82 Photocopies of six photographs includes one large panoramic view.

83 Cross Sections, Chesterfield Charter Township, Macomb County, MI, Planner: Robert Leighton Associates, Inc.

84 Three pages, 25.212, Sec. 6.2 Water Connection Fee.

STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 301, Inland Lakes and Streams, and Part 303, Wetland Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of June and Keith Carabell and Frances and Harvey Gordenker

File No. 93-14-602

FINAL DETERMINATION AND ORDER

The above captioned matter was the subject of a contested case hearing resulting in the issuance of a Proposal For Decision dated August 12 , 1998. In a letter dated August 12, 1998, the Office of Administrative Hearings gave the Parties to September 1, 1998, to file written Exceptions to the proposal for Decision. On August 19, 1998, counsel for Mr. and Mrs. Carabell and Mr. and Mrs. Gordenker (Petitioners) filed a letter requesting that the Proposal for Decision be accepted. Counsel for the Department of Environmental Quality {Department) filed a request for an extension of the filing date on September 2 and September 11, 1998. On September 17, 2.998 the Department filed its Exceptions. The matter is now before the Chief Administrative Law Judge of the Office of Administrative Hearings for a final agency decision pursuant to Executive Order 1995-18 and Delegation Letter No. OAH-324.101 et seq.- 01.

This Tribunal has considered the Proposal For Decision, the Parties Exceptions, exhibits, transcripts, pleadings and arguments proposed findings and conclusions not addressed in this Final Determination and Order were found to be unsupported by the record or unnecessary in making a final decision in this contested case.

The Department raises eleven Exceptions to the Proposal for Decision. Exceptions 6, 7, 10 and 11 are not addressed below because they attempt to reargue the facts. In considering these four Exceptions, it is noted that the Administrative Law Judge (ALJ) who heard the testimony is in the best position to consider it and assign to it an appropriate evidentiary value. The ALJ's findings will not be disturbed unless they are not supported by the record or result in a clearly unjust decision. Based on the record in this case, the ALJ' s findings challenged in these Exceptions are supported by the record and do not result in a clearly unjust decision. All other Exceptions are addressed individually.

Exception 1

This exception requests that the Final Order recognize the U.S. Environmental Protection Agency's opposition to the proposed activity and note the need for a separate permit under §404 of the Clean Water Act. The only issue properly before this Tribunal is whether the Petitioners are entitled, under the criteria of Part 303 of the Natural Resources and Environmental Protection Act, to the permit for the requested activity. Any permit issued under Part 303 does not obviate the necessity of receiving, when applicable, approval from

other federal, state or local government agencies. 1988 AACS, R. 281.923(6).

Exception 2

This exception contends the basis for the decision in the Proposal for Decisions in conflict with Part 303 (MCL 324.30301 et seq.) and the Administrative Procedures Act (MCL 24.201 et seq.). In support of this contention the Department cites eight instances where it alleges the ALJ's rulings on admissibility of evidence were improper or the standard of review was inappropriate.

The first premise asserts the Department was prejudiced by evidentiary rulings described as being "arbitrary and capricious". A review of the rulings indicates the questioning was properly limited to correspond to the rules of evidence. Additionally, in reviewing the record there is no support for the contention that the exclusion of evidence, at any point in the proceedings, was prejudicial to the Department's case.

The second premise of this Exception, the standard of review, is also without merit. The Petitioners are entitled to a de novo review of whether they are entitled to the permit based on the evidence adduced during the hearing. This Tribunal is not constrained to look only at the activity proposed in the application, or the activity the Department will permit. Rather, a final agency decision is rendered, based on the record, on what activity, if any, is allowable under Part 303. By its very nature a contested case hearing will generate information from both Parties over and above that utilized by Department staff in deciding on the permit

application. To place a limit such as the Department suggests would turn the process into an examination of whether the Department erred in denying the application. This result would eliminate the de novo nature of this Tribunal's jurisdiction and mandate to render a final agency decision. MCL 24.203(3) and MCL 24.285. The Department's seemingly narrow view of this Tribunal's function as it relates to contested case hearings and final agency decisionmaking is misplaced.

Exception 3

This Exception alleges the evidence does not support the finding that the 112 unit proposal, with on-site wetland enhancement as mitigation, is a feasible and prudent alternative. However, a review of the record supports the finding that under the review mandated by § 30311 (2) (c) the subject wetland is of questionable value, and the proposed enhancement will provide greater benefit than any detriment resulting from any wetland lost. Therefore, the feasible and prudent alternative finding is appropriate under the criteria of Part 303.

This Exception also goes to great length in arguing the Department's real estate expert is more Qualified than the Petitioners' experts. As discussed above, this constitutes an effort by the Department to reargue the facts of the case. The finding will not be disturbed unless it is not supported by, the record or results in a clearly unjust decision. A review of the record does not support reversing this finding.

Exception 4

In this Exception the Department is accurate that the Proposal for Decision lists only one of the three criteria which the Department must determine in considering mitigation proposals 1988 AACS, R 281.925 (Rule 5) Rule 5 consists of two parts, the first deals with the review of mitigation plans, the second with permit conditions. However, contrary to the language of Rule 5, the Department argues, the practicality of mitigation is not a proper issue for consideration.

Rule 5 sets forth the conditions which must be met if the Department is to impose mitigation as a condition of a permit in order to improve on-site wetlands, or create a new wetland to replace one lost to the proposed activity. In this case, off-site mitigation to the extent and nature desired by the Department is precluded. The alternative plans proposed to either preserve a portion of the wetland or enhance the remaining wetland. Enhancement is described as dredging and planting of diverse plant species in order to improve the quality of the wetland. The record shows enhancement would serve to improve water quality and increase the diversity of plant life, wildlife in the area and the aesthetics of the parcel. (Testimony of R. Leighton, 10/28/97, pgs. 395-399). Under the facts in this case, the proposed enhancement constitutes mitigation.

The Proposal for Decision found that of the three alternatives, the one containing enhancement is a feasible and prudent alternative to the other two. This finding is supported by the record, but the activity will cause an unavoidable impact on the wetland. The next step is to determine if sufficient and practical steps have been taken to minimize the impact. The record supports the finding that enhancement, as opposed to

off site mitigation, is the practical method for minimizing the proposed project's impact. The Department's contention that the Petitioner could, in the metropolitan area, obtain a land-locked parcel, a small parcel, or a contaminated parcel for mitigation is without merit. Given this, off-site mitigation is impractical and due to the scope of the activity and the configuration of the parcel, on-site mitigation is limited to the enhancement of the remaining wetland. The enhancement will, according to the record, improve the benefits derived from the existing wetland. Therefore, enhancement serves to significantly lessen the impairment to the wetland and mitigate the impact of the proposed activity. .

The Department contends subsection (d) of Rule 5 supports the imposition of its "general rule", which was covered in great detail during the hearing, that mitigation is typically required at a ratio of 1.5 acres of wetland created for every acre of wetland impacted. However, the language of subsection (d) states " . . . there must be no net loss of wetland resources." (Emphasis added) . According to the record in this case, little if any of the wetland resources enumerated in §30302 (b) are currently being provided by the wetland. It then follows that the enhancement of the wetland will not diminish those resources, but rather they will be improved upon. Thus the Department's position is not supported by Rule 5, regardless of the length of time it has been utilized or the number of applicants who have agreed to the ratio. Every permit -application must be reviewed on its merits, just as every mitigation proposal must be reviewed in the context of the permit application and facts of that particular situation. The ratio may vary depending on the facts and there is no

basis upon which to imply Rule 5 requires a 1.5 to 1 ratio.

In this case, the Petitioners have proposed mitigation which will serve to improve existing wetland benefits, which are currently minimal, to offset the loss of the resource due to the proposed activity. Under the permitting criteria of Part. 303 the proposed activity will result in an unavoidable impact, to which a feasible and prudent alternative does not exist. Pursuant to subsection 4 of Rule 5, no feasible and prudent alternatives which would avoid the loss of the resource have been found to be practical. Therefore, the finding that the on-site enhancement is practical, while off-site mitigation is not, is proper.

Exception 5

The Department contends the U.S. Fish and Wildlife Service's opposition to the proposed activity is sufficient cause to reject the Proposal for Decision. This Exception must fail for two reasons. First, the Department's proofs regarding the activity's impact on wildlife was addressed In the Proposal for Decision. Second, this argument, in the context of whether the Petitioner is entitled to a permit under Part 303, is without merit.

Exception 8.

This Exception raises the significant legal point regarding wetland dependency. The Department argues only activity that must be performed in wetland meets the wetland dependency test. Conversely, every other permittable activity is not wetland dependent and

must, therefore be conducted on upland.

Section 30311 (4) reads

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following :

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist.

The operative term in 4(a) is "being located in the wetland". The plain and unambiguous meaning of this term is whether the activity must extend into the portion of the parcel which is wetland. If the entire parcel is wetland, the activity must occur in it so as to allow a use of the parcel. If, as in this case, the existing upland is not large enough to accommodate the feasible and prudent alternative, impact on the wetland is unavoidable. The Proposal for Decision found, and the record supports, the proposal of 112 Units with enhancement is a feasible and prudent alternative to the Department's proposal of a project with less impact in the wetland. Therefore, the proposed activity is primarily dependent in being located in the wetland.

The Department asserts the foregoing analysis is inconsistent with its staff's interpretation and application of the wetland dependent provision. While

deference is accorded the staff's position in that they are responsible for the day-to-day administration of Part 303, greater deference is given to the clear language of the statute and prior interpretations of the language by this Tribunal. Appeal of Robert C. Brammer, Sr. , File Nos. 88-6-500 & 90-6-159W. To do otherwise would lead to a result which is inconsistent with the law. Based on the foregoing, the Finding of Fact in the Proposal for Decision that the project is wetland dependent is proper.

The purpose of this Final and Determination and order is to determine if the Proposal for Decision should be accepted. In reviewing the evidence, including the hearing transcripts, the ALJ's finding that a 112 unit development with on-site wetland enhancement is consistent with the permitting criteria enunciated in Part 303 is proper. Therefore, the Chief Administrative Law Judge of the Office of Administrative Hearings ADOPTS AND INCORPORATES BY REFERENCE the Proposal For Decision dated August 12, 1998, including the Findings of Fact and Conclusions of Law. THEREFORE; IT IS ORDERED:

1. The Proposal For Decision dated August 12, 1998, is adopted by reference and incorporated into this Final Determination and order.

2. The application for a permit for File No. 93-14-502 is DENIED.

3. A permit shall be issued consistent with the proposed activity set forth in Exhibit P-79 and this Final Order and Determination.

4. The Office of Administrative Hearings does not

retain jurisdiction in this matter

Dated: September 30, 1998

Richard G. Lacasse, Chief Administrative Law Judge
Office of Administrative Hearings

Lake St. Clair Advisory Committee

P.O. Box 272, Mt. Clemens, MI 48040

January 17, 2000
Walter A. Gauthier
Permit Evaluation Section B
Corps of Engineers
P.O. Box 1027
Detroit, Michigan 48231

Mr. Gauthier

In reference to JPN permit alication#99-250-002-1 by Keith and June Carabell, the applicants do not provide for adequate mitigation for the lose of the wetland. Although mitigation of wetland is still an imperfect science, duplicating a forested wetland makes the task of mitigation much more complex if not impossible. This is truly a unique piece of property within the borders of Chesterfield Township. Although the recent seasons have left this site somewhat dry, the property as the ability to store, filter, and recharge the ground water.

The Administrative Law Judge's decision to overrule the MOEO appeared to be based on housing needs of the area and providing the applicants with a profit on a speculative venture. The applicants four witnesses included land and real estate consultants plus a judge's report also mentions that the area is fully developed and, therefore, there is virtually no remaining wetland. Does this mean that a wetland in this area is of no value for the community? Furthermore, the report views the forested wetland as unproductive and could be replaced

with a man-made/enhanced wetland.

The Lake St. Clair Advisory Committee stands by its decision made in 1993 to request that the application be denied.

Respectfully,
Donald Gunning, Chairman
Lake St. Clair Advisory Committee

Cc: MUCC Wetlands Watch
Elaine Fischoff, Asst. Attorney General
Mark Richardson, Asst. Macomb Co. Prosecutor

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 0 7 2000

LTC Robert J. Davis,
District Engineer
U.S. Army Corps of Engineers,
Detroit District
P.O. Box 1027
Detroit, Michigan 48231

Re: Joint Public Notice, File No: 99-250-002-1, Keith and June Carabell

Dear Colonel Davis:

The U.S. Environmental Protection Agency (EPA) reviewed the Public Notice issued by your office, in which Keith and June Carabell request your authorization to discharge approximately 57,500 cubic yards of fill into 15.87 acres of wetlands in Chesterfield Township, Macomb County, Michigan. The applicants propose to dredge and replant 3.74 acres of the remaining wetlands on the 19.61 acre parcel as compensatory mitigation for the proposed project, the purpose of which is, to construct a condominium, development.

In response to the Michigan Department of Environmental Quality's (MDEQ) Public Notice No. 93-14-602, EPA provided combined comments for itself

and the U.S. Fish and Wildlife Service (FWS) to the MDEQ, on March 4, 1994, objecting to the proposed project (copy enclosed). Our comments asserted that insufficient information was provided to determine compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines, based on the applicants failure to provide an adequate alternatives analysis, failure to minimize wetland impacts and proposal to create compensatory mitigation that was neither adequate nor in-kind. By order of an administrative law judge, the MDEQ issued the permit on November 13, 1998. EPA sustained Federal objections on November 23, 1998, effectively transferring permitting authority to you, pursuant to CWA Section 404(j) and 40 CFR Part 233.500).

We note that the proposal before you is essentially identical to that authorized by the MDEQ on November 13, 1998. As a result of the applicant's repeated failure to address the concerns raised by the Federal agencies in 1994, and the significant proposed impact to the Nation's wetland resources, EPA has no choice but to object to the current proposal. Insufficient information has been provided to determine compliance with the Clean Water Act Section 404(b)(1) Guidelines, therefore, EPA recommends that the proposed permit be denied unless the applicant provides an adequate alternatives analysis, demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable, and provides an acceptable mitigation plan to construct in-kind wetland mitigation at a minimum ratio of 1.5:1.

Thank you for the opportunity to provide comments on this proposal. Please address any questions to Gerald

D. Winn of my staff at (312) 886-2777.

Sincerely,
Jo Lynn Traub
Director, Water Division Enclosure

cc: Bob Deroche, Corps of Engineers, Detroit District
Jenny Wilson, FWS East Lansing.

United States Department of the Interior
FISH AND WILDLIFE SERVICE
East Lansing Field Office (ES)
2631 Coolidge Road
East Lansing, Michigan 48823

March 8, 2000

Walter A. Gauthier, Chief
Permit Evaluation Section E
Regulatory Branch
U.S. Army Corps of Engineers
P.O. Box 1027
Detroit, MI 48231

Re: Corps File No. 99-250-002-1, applicant Keith and June Carabell

Dear Mr. Gauthier:

We have reviewed the above referenced joint public notice to authorize the placement of fill materials in wetlands. The proposed project is in section 21, T3N, R14E, Chesterfield Township, Macomb County; Michigan. These comments are prepared under the authority of the Fish and Wildlife Coordination Act and the Endangered Species Act of 1973 (Act), as amended. They are also consistent with the Service Mitigation Policy,

The applicant proposes to discharge approximately 57,500 cubic yards of material within a 15.81 acre wetland area for construction of a 112 unit townhouse condominium complex on a 19.61 acre parcel. The applicant also proposes to dredge and replant 3.74 acres

of the remaining wetlands on the parcel as Mitigation for the project.

Fish and Wildlife Coordination Act Comments.

General Comments

We are opposed to the development of non-water dependent facilities, such as condominiums, in wetlands when fish and wildlife resources would be adversed impacted and alternatives are available. Wetlands in a suburban location, such as the ones present on the project site, are becoming increasingly scarce and provide refuge for both resident and migratory wildlife in this area.

The plans for this project do not appear to be substantively different from project we reviews or this site under the state File Na 93-14-602W. As we stated previously, the site contain palustrine forested wetlands throughout the project area. These wetlands serve as valuable habitat for songbirds, raptors, small mammals, amphibian, reptiles, and aquatic and terrestrial invertebrates by providing food, water, cover from predators, and shelter during severe weather. In addition these wetlands likely retain and filter surface water runoff, thereby reducing downstream flown during storm events in the adjacent streams and improving water quality in adjacent water bodies.

SPECIFIC COMMENTS

Potential Project Impacts
The applicant's proposal would directly impact

approximately 15.97 acres of forested wetland through filling for the proposed condominium development and an additional 3.74 acres by dredging for the mitigation project. While some species of wildlife may be able to tolerate habitat provided by the proposed condominium development, the proposed wetland filling and concomitant tree removal would displace or destroy animal species associated with the up lands and wetlands to be impacted by this project. In addition, the proposed project would create large areas of impermaeable surfaces on the site. Runoff from these areas would likely contain contaminants such as oil and grease from parking lots and fertilizers or pesticides from landscaping activities. runoff, if not adequately addressed, may become a contaminants source to, the remaining wetlands on the site and potentially to waters downstream, including Lake St. Clair, as the runoff passes off the property by means of the adjacent drain.

Alternative Analysis

Significant wetland losses have taken place in Michigan since the early 1800s. The wetlands that remain continue to be lost incrementally through draining and filling for various purposes throughout the state. Forested wetlands are of particular concern since, once altered, they may take decades to regenerate or may not return at all. Macomb County has lost approximately 71% of the acreage of mixed hardwood wetlands once present and has lost 73% of overall wetland acreage county-wide (Comer 1996).

In light of the magnitude of these losses, we recommend you rigorously explore with the applicant,

less environmentally damaging alternatives to the project as currently proposed. It does not appear the applicant has considered alternate, non-wetland sites for the proposed non-water dependant activities. In addition, it does not appear wetland impacts have been avoided on-site to the maximum extent practicable. We recommend exploring upland development, on or off-site, and reconfigurations of buildings and associated infrastructure on-site as means to further avoid or minimize wetland impacts.

Adequacy of Proposed Mitigation

We understand the applicant has proposed to dredge and replant 3.74 acres of the remaining wetlands on the parcel as mitigation for project impacts. We submit that this proposal would not replace the functions and values of the 15.87 acres of forested wetlands lost as a result of the proposed project. In addition, we contend that the applicant's proposal to excavate existing wetlands would merely exchange one wetland type for another (i.e., exchange forested with emergent or open water habitat thus exacerbating the loss of forested wetland functions and values in this area.

We recommend, if you determine that wetland impacts on the project site are in the public interest and an alternatives analysis clearly shows that those impacts have been avoided and minimized to the maximum practicable extent, that you require the applicant to provide for agency consideration in advance, a detailed mitigation plan that meaningfully replaces lost wetland function and values. In addition, we normally recommend exhausting all opportunities for on-site, in-kind (i.e., forested) replacement of wetland functions

and values before considering off-site or out-of-kind opportunities for compensatory mitigation, Since this site in already wetland, we continue to recommend in-kind replacement of any authorized wet land impacts, however, we recommend locating replacement wetlands within the watershed and in as-close proximity to the affected wetlands as possible but off-site to avoid additional impacts to on-site wetlands.

Finally, we recommend that any mitigation proposal provided for consideration include:

o A commitment to replace the lost functions and values of-any impacted wetlands. (We generally recommend an acreage replacement ratio of a minimum of two acres replaced, for each one acre impacted for forested wetlands, although this ratio varies if the mite anon is out-of-kind or not on-site or in close proximity to the impacted wetlands.)

o The detailed identification and characterization (type, size, dominant vegetation, soil type, etc.) of all wetlands located in the area of the proposed project.

o The identification of resident and migratory fish and wildlife resources occurring or reproducing in the affected area of the proposed project.

o The exact location of mitigation sites and the identification of soil types in these areas sites to be created restored, enhanced or preserved should be clearly labeled and a map showing the locations and boundaries should be included with the proposal.

o A plan to control the establishment of undesirable

exotic and invasive plant species such as purple loosestrife (Lythrum salicaria), common buckthorn (Rhamnus cathartica), and reed grass (phragmites australis).

o A plan, with performance criteria, to monitor the progress of the wetland habitat mitigation following construction for a minimum period of five years. The plan should include a sampling protocol and a timetable for the habitat monitoring that includes the time of year and the frequency of sampling. Annual monitoring reports should be submitted. Termination of monitoring after the appropriate time period would be contingent upon Corps of Engineers concurrence that the wetland mitigation site exhibits a strong likelihood of successful replacement of the impacted wetland habitat's functions and values.

o A plan to implement appropriate measures for correcting or improving the biological productivity of the wetland mitigation habitats for the duration of the monitoring period in the event that performance criteria are not met. This would include planting desirable hydrophytic vegetation, controlling exotic and invasive plant species, and implementing other measures, as necessary, to achieve successful mitigation.

o The development of procedures to protect, in perpetuity, any wetland habitat remaining on the project site and the compensatory wetland mitigation areas by a conservation easement recorded as a deed restriction.

Endangered Species Act Comments:

Information in our files indicates the endangered Indiana bat (Myotis sodalis) may occur in the project area. Indiana bat is listed as endangered pursuant to the Act. It is also protected by the Michigan Department of Natural Resources (MDNR) through Part 365, Endangered Species Protection of the Natural Resources and Environmental Protection Act, 1994, PA 451. Please contact Lori Sargent of the MDNR at (517) 373-1263 with questions concerning the protection of threatened and endangered species under state law.

Summering Indiana bats roost in trees in riparian, bottomland, and upland forests. Roost trees generally have exfoliating bark which allows the bat to roost between the bark and bole of the tree. Cavities and crevices in trees are also used for roosting. A variety of tree species are known to be used for roosts. Structure (i.e. Crevices or exfoliating bark) is probably more important than the species of tree in determining if a tree is a suitable roost site.

Male bats disperse throughout the range and roost individually or in small groups. In contrast, reproductive females form larger groups, referred to as maternity colonies. Female Indiana bats exhibit strong site fidelity to summer roosting and foraging areas, that is, they return to the same summer Range annually to bear their young. Traditional summer sites are essential to the reproductive success of local populations.

Indiana bat maternity sites generally consist of one-or more primary maternity roost trees which are used repeatedly by large numbers of bats, and varying

numbers of alternate roosts, which may be used less frequently and by smaller numbers of bats (Kurta et al. 1993). Bats move among roosts within a season and when a particular roost becomes unavailable from one year to the next. It is not known how many alternate roosts must be available to assure retention of a colony within a particular area, but large, nearby forest tracts appear important (Callahan 1993). In addition to having exfoliating bark, roost trees must be of sufficient diameter. Trees in excess of 16 inch diameter at breast height (dbh) are considered optimal for maternity colony roost sites, but trees in excess of 9 inch dbh appear to provide suitable maternity roosting habitat (Romme et al. 1995). Male Indiana bat have been observed roosting in trees as small as 3 inch dbh.

As required by Section 7 of the Act and its implementing regulations, you must determine whether issuance of a permit for the proposed activities may affect species listed as threatened or endangered pursuant to the Act. If issuance of a permit may affect a listed species, you must consult with our East Lansing Field Office. Enclosure A briefly describes a federal agency's basic responsibilities and requirements under the Act.

We recommend, at a minimum, a qualified individual survey the project site for the presence of suitable Indiana bat habitat. If the survey determines that suitable habitat in present on-site, we recommend you do not issue a permit for the proposed project or any other project that may affect wetlands on this site until you ensure protection of the bats and have concluded consultation with this office.

Summary Comments:

We recommend you do not issue a Department of the Army permit for the project as proposed until our endangered species and wetland concern are removed. The applicant has not clearly demonstrated that less environmentally damaging, or upland alternatives are unavailable. We further recommend a complete alternatives analysis and meaningful wetlands mitigation plan be prepared and provided for review if continued consideration is accorded this or any modified proposal that would affect these wetlands. Finally, we recommend you consult with our East Lansing Field office regarding the potential effects of the proposed project on Indiana bat if suitable habitat is present on-site.

We appreciate the opportunity to provide our resource protection recommendations. If you have questions, please contact Jenny Wilson of this office at 517-351-6326 or the above address.

Sincerely.

Craig A. Czarnecki
Field Supervisor

CC: Michigan Department of Environmental Quality, Land & Water Management Division, Livonia, MI (Attn: Mike Nurse)
Michigan Department of Natural Resources, Wildlife Division, Lansing, MI (Attn. Lori Sargent)

Literature Cited

Callahan, E.V., III. 1993. Indiana bat summer habitat requirements. M.S. Thesis. University of Missouri Columbia. 84 pp.

Comer, P.J. 1996. Wetland Trends in Michigan Since 1800: a preliminary assessment. Report to the U.S. Environmental Protection Agency, Water Division, and the Land and Water Management Division, Michigan Department of Environmental Quality. Michigan. Natural Features Inventory, Lansing, MI. 76pp.

Kurta, A., D. King, J.A. Teramino, J.M. Stribley and K.J, Williams. 1993. Summer roosts of the endangered Indiana bat (Myotis sodalis) on the northern edge of its range. Am. Midl. Nat. 129:132-138.

Romme, R. C. , K. Tyrell, and V. Brack, Jr. 1995. Literature summary and habitat suitability index model: components of summer habitat for the Indiana bat (Myotis sodalis). Report to Indiana Department of Natural Resources, Federal Aid Project E-1-7, Study No, 8, 38pp.

FEDERAL AGENCIES' RESPONSIBILITIES UNDER SECTION 7(a) AND 7 (c) OF THE ENDANGERED SPECIES ACT

SECTION 7 (a) – Consultation/Conference

Requires:

1. Federal agencies to utilize their authorities to carry out programs to conserve endangered and threatened species;

2. Consultation with U.S. Fish & Wildlife Service (Service) when a federal action may affect a listed endangered or threatened species to ensure that any action authorized, funded, or carried out by a federal agency is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The process is initiated by the federal agency after they have determined if their action may affect (adversely or beneficially) a listed species: and

3. Conference with Service when a federal action is likely to jeopardize the continued existence of a proposed species or result in destruction or a adverse modification of proposed critical habitat.

SECTION 7 (c) – Biological Assessment for Major Construction Projects[1]

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[1] "Major Construction project" means any major federal action which significantly affects the quality of the human environment as referred to in NEPA (requiring an EIS) designed primarily to result in the building or

Requires federal agencies or their designees to prepare a Biological Assessment (BA) for major construction projects. The purpose of the BA is to identify any proposed and/or listed species which is/are likely to be affected by a construction project. The process is initiated by a federal agency in requesting a list of proposed and listed threatened and endangered species. The BA should be completed within 180 days after its initiation (or within such a time period as is mutually agreeable). If the BA is not initiated within 90 days of receipt of the species list, please verify the accuracy of the list with the Service. Sec. 7(d) states agencies shall not make any irreversible or irretrievable commitment of resources during the consultation process which would result in violation of the requirements under Section 7 (a) (2). Planning, design, and administrative actions may be taken; however, no construction may begin.

To complete the BA, your agency or its designee should (1) conduct an onsite inspection of the area to be affected by the proposal which may include a detailed survey of the area to determine if the species is present and whether suitable habitat exists for either expanding the existing population or potential reintroduction of the species (2) review literature and scientific data to determine species distribution, habitat needs, and other biological requirements; (3) interview

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erection of man-made structures such as dams, buildings, roads, pipelines, channels, and the like. This includes federal actions such as permits, grants, licenses, or other forms of federal authorization or approval which may result in construction.

experts including those within the Service, state conservation departments, universities, and others who may have data not yet published in scientific literature; (4) review and analyze the effects of the proposal on the species in terms of individuals and populations, including consideration of cumulative effects of the proposal on the species and its habitat; (5) analyze alternative actions that may provide conservation measures; and (6) prepare a report documenting the results, including a discussion of study methods used, any problems encountered, and other relevant information. Upon completion, the report should be forwarded to; Field Supervisor, U.S. Fish & Wildlife Service, 2651 Coolidge Rd., East Lansing, MI 48823-6316.

March 14, 2000

Walter A. Gauthier
Permit Evaluation Section B
Corps of Engineers
P.O. Box 1027
Detroit, MI 48231

Re: Comments on Permit Application File No. 99-250-002-1 Discharge of Fill Material in Wetlands, Chesterfield
Township MI

Dear Mr. Gauthier:

These comments are submitted on behalf of the Walter Quality Unit of the Macomb County Prosecutor's Office. The Water Quality Unit is responsible for civil and criminal enforcement of environmental and public health statutes and ordinances in Macomb County by resolution of the Macomb County Board of Commissioners.

Keith and June Carabell are seeking a permit under Section 404 of the Clean Water Act to the Clean Water Act to fill a15.87 acre wetland area for construction of a 112 unit townhouse condominium development. The Carabells propose to dredge and replant 3.74 acres of wetland remaining wetlands on the parcel as mitigation for the project. The parcel is located southeast of the I-94 and M-29 interchange east of Donner Road in Chesterfield Township, Macomb County Michigan.

The approximately 16 acres of wetland which would be filled by the proposed project and the approximately 4

acres mitigation area are high quality palustrine forested wetland characterized by a rich diversity of plant and animal life. In effect, the applicant proposes to eliminate over 19 acres of forested wetland area and replace it with 4 acres of less-valuable emergent wetland. This simply cannot be permitted under Section 404. The loss of this high quality wetland area would have an unacceptable adverse effect on wildlife, water quality, and conservation of wetlands resources.

This parcel is one of the last remaining sizable areas of forested wetland in Chesterfield Township. For this reason alone, its destruction would have a devastating impact on wildlife habitat in the area. Runoff from the condominium development would further degrade surface water resources in the area. These detrimental impacts completely outweigh any conceivable benefits which might be derived from the project. In addtion, the applicant has not shown that the project is wetland-dependent; that alternatives to the westland site are not available; or that mitigation measures adequate to compensate for the loss of this wetland cannot be accomplished.

The Water Quality Unit of the Macomb County Prosectuor's Office respectully request that the permit application be denied.

Sincerely,

Mark A. Richardson
Assistant Macomb County
Prosecuting Attorney For Water Quality

CC: Carl J. Malinga

Donald Gunning

CELRE-ET-RG 99-250-002-1

May 5, 2000

MEMORANDUM TO: File

SUBJECT: INSPECTION REPORT of CARABELL CONDOS

Inspection Date: 05-May-2000
Authority: 404
Jurisdiction (State transferred Section 404 water);
Noncompliance N/A
Unauthorized Work N/A
Photographs NO
Application for Work Yes
Work in Progress. NO
Remedial Action NIA

APPLICANT (Owner):
Carabell, Keith and June
c/o Tim Stoepker, Abbot
300 River Place, Suite 3000
Detroit, MI 48207
Work: (313) 566-2500
Home:

LOCATION:
Address: Donner Road
City: Chesterfield Township
County: Macomb
State: Ml
Sec: 21
Twp:3N
Rge:14E

JURISDICTION:
Waterway: in wetlands adjacent to
First Section 10 Waterway: Lake St. Clair
Navigable: N Wetland: Y Above: Headwaters: N

Waterward of OHWM: No
Potential to influence course, condition, capacity of Section 10 waters: Yes
Designated Wetland on Quad, NWI dr Soil Survey: Yes
Wetland adjacent to other waters: No
(Complete Adjacency Section)
Tributary to navigable water: No

INVESTIGATOR'S SUMMARY (descriptions of work including equipment, conversation summaries, observed/predicted impacts of work, any necessary remedial or corrective action, need to take discretionary authority): Purpose of the visit was to determine if the site supports interstate commerce. Project manager Bob Deroche was accompanied to the site by Dr. Tom Allenson of the Detroit District staff. Dr. Allenson is considered the district's most knowledgeable bird men. Many species of neo-tropical migrants, as well as other migratory birds were identified by sight and/or call. It was determined that the site does support interstate commerce. See attached bird listing.

DETERMINATION OF ADJACENCY

Hydrological connection(s) with waterway: Site is approximately 1.2 miles (straight distance) from Lake St. Clair, however, Sutherland-Cemig Drain runs adjacent to the site. The Drain flows continuously and flows into Auvase Creek which flows into Lake St.

Clair Wetland's elevation above waterway: According to software "Terrain Professional", the site is approximately 5 feet above the mean Lake St. Clair elevation.

INSPECTOR: DEROCHE

Detroit District
U.S. Army Corps of Engineers

File Number 99-250-002-1

Department of the Army Permit Evaluation
CARABELL CONDOS

This document constitutes my Environmental Assessment, Public Interest review summary, and, if applicable, my factual and compliance determination according to the 404 (b) (1) Guidelines for the work proposed for permit. It was prepared from a generic master document that facilitated consideration of the range of all possible impacts from projects within the purview of the Regulatory Program of the Army Corps of Engineers, in accordance with 33 CFR Part 320 33 CFR Part 325 Appendixes B and C, and 40 CFR Part 230.

I. Application Processing

A. Name of Applicant: Keith and June Carabell, Detroit, MI.
Attorney/Agent for Applicant: Mr. Timothy A. Stoepker, Law Offices of Abbott, Nicholson, Quilter, Esshaki, & Youngblood, 300 River Place, Suite 300, Detroit, Michigan 48207-4225.

Environmental Consultant: Robert Leighton Associates, 167 Little Lake Drive, Ann Arbor, Michigan 48103.

B. Work Description: The most recent plans showing the proposed work are attached (Encl. 1.). The

applicant proposes to discharge approximately 57,500 cubic yards of material within a 15.97 acre wetland area for construction of a 112-unit townhouse condominium development. As mitigation, the applicant proposes to dredge and replant 3.74 acres of the remaining wetlands on the parcel.

The applicant originally applied to Michigan Department of Environmental Quality (MBEQ) for a permit to discharge fill material on the subject property for construction of a 200-unit condominium complex. That application was denied in 1987 and the denial upheld in Michigan Court of Appeals. The current application was submitted to MDEQ in 1993 for an alternate plan that would result in a 130-unit condominium complex on the parcel. Again, this was denied by MDEQ in 1994. The denial was based on the findings that "the proposed activity would have a significant adverse impact on the natural resources, public interest and public trust held in the subject wetlands". They also cite lack of water dependency, lack of minimization, available upland alternatives, Environmental Protection Agency (EPA) and Department of the Interior, Fish and Wildlife Service (FWS) objections, and lack of mitigation for reasons for denial. A state contested case hearing was held in 1998 before Administrative Law Judge Richard A. Patterson who determined that a permit for a 112-unit alternative on the site should be issued. The MDEQ permit was issued in November of 1998 as directed by Judge Patterson. The permit was issued over outstanding EPA objections; therefore, the state permit does not fulfill requirements for a federal Section 404 permit under the Clean Water Act.

C. Purpose: The applicant's stated purpose for the work is preparation of a private lot for construction of a condominium complex. Our interpretation of the project purpose relevant to alternatives in NEPA Regulations (Appendix B, 7.) and Regulations at 320.4(a) (2) (ii), relevant to necessity in the context of 320.4(b) (1), and as defined in the 404(b) (i) Guidelines and subsequent guidance as "overall project purpose" is to construct a large multi-family condominium development within the Macomb or St. Clair County, Michigan area.

D. This application for a Department of the Army permit is being reviewed under authority delegated to the District Engineer by the Secretary of the Army and the Chief of Engineers by Title 33, Code of Federal Regulations, Part 325.8, pursuant to Section 404 of the Clean Water Act.

E. Public Involvement: A list of the agencies, interested groups, and the public consulted regarding the project is attached to the Public Notice dated February 8, 2000 which expired on March 9, 2000 (Encl. 1).

F. Federal, State, Local, and Public Comments Relating to the Activity:

1. Federal:

a. U.S. Environmental Protection Agency (EPA) : The EPA responded by letter dated March 7, 2000. They object to issuance of a federal permit unless the applicant provides an adequate alternatives analysis, demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable, and provides and acceptable mitigation plan to construct in-

kind wetland mitigation at a minimum ratio of 1.5:1 (EPA, Encl. 2). The EPA cites "the significant proposed impact to the Nation's wetland resources", as a reason for objecting to issuance of a permit, as well.

b. U.S. Fish and Wildlife Service (FWS): The FWS responded by letter dated March 14, 2000. They object to issuance of a federal permit because fish and wildlife resources would be adversely impacted through elimination or alternation of habitat and potential contamination of water due to runoff from the large areas of impermeable surfaces on the site. FWS states that Macomb County has lost 71% of its historical acreage of mixed hardwood wetlands and 73% of overall wetland acreage that were at one time present and that wetlands in suburban locations are becoming increasingly scarce. These wetlands are important because they provide refuge for both resident and migratory wildlife in this area. In addition, they express concerns over the potential project impacts to the federally-listed as endangered Indiana Bat (Myotis sodalis). They recommend a survey of the project site for the presence of suitable Indiana Bat habitat, as well as a wetland mitigation plan for their review should the Corps of Engineers proceed with consideration of this or any modified proposal that would affect the wetlands on the parcel (FWS, Encl. 3).

FWS points out that the proposed wetland filling and tree removal would displace or destroy animal species associated with uplands and wetlands. They submit that the proposed mitigation would not replace the many lost functions and values, but would merely exchange one wetland type for another, exacerbating the loss of forested wetland functions and values in the

area. The Service requests the opportunity to review any mitigation plan submitted, should the Corps determine that issuance of a permit is not contrary to the public interest.

c. Congressional: No interest was expressed by any member of Congress.

2. State:

a. Michigan Department of Environmental Quality (MDEQ) denied the original permit application on February 22, 1994 (MDEQ, Encl. 4). The proposal requested a permit for fill in 15.96 acres of wetlands for the construction of 130 condominium units on the parcel. As a result of a Contested Case Hearing with MDEQ, a Final Determination and Order was issued on September 30, 1998 (MDEQ, Encl.5). The Order resulted in issuance of an MDEQ permit on November 13, 1998 for the proposal currently being reviewed for a DA permit (MDEQ, Encl. 6). We, therefore, presume that the project is consistent with the Coastal Zone Management Act and that Section 401Water Quality Certification is issued or waived.

b. State Historic Preservation Officer (SHPO) : SHPO submitted a letter dated June 7, 2000 stating that no historic properties are affected within the area of potential effects of this undertaking (SHPO, Encl. 7).

3. Local : One letter was received from Mark A. Richardson, assistant Macomb County Prosecuting Attorney for Water Quality, on behalf of Macomb County requesting the permit for the proposed work be denied (MCPA, Encl. 8). The letter states that the

destruction of one of the last remaining sizeable forested wetland areas in Chesterfield Township would have a devastating impact on wildlife habitat in the area and that runoff from the condominium development would further degrade surface water resources in the area. He states the applicant has not shown that the project is wetland-dependent; that alternatives to the wetland site are not available; or that mitigation measures adequate to compensate for the loss of this wetland cannot be accomplished.

The City of Detroit Water and Sewerage Department submitted a letter stating there is no apparent conflict with any department utilities (DWSD, Encl. 9).

4. Public: We received an objection letter from Mr. Donald Gunning on behalf of the Lake St. Clair Advisory Committee dated January 17, 2000 requesting the permit application be denied (LSAC, Encl. 10). The objector states that the forested wetland has the ability to store, filter, and recharge the groundwater and questions the administrative law judge's report on the value of the remaining few wetlands within the Township.

G. The applicant was furnished copies of all timely objections, by letter dated March 20, 2000 and was afforded the opportunity to resolve/rebut them. We also directed the applicant to specifically provide a survey for the existence of the federally-listed as endangered Indiana Bat (Myotis sodalis) and of suitable habitat for the species and to provide their analysis of available alternatives to filling in this forested wetland (Encl. 11).

The applicant's attorney responded to the objections/request by letters dated March 28, 2000 and May 23, 2000 (Encls. 12&13, respectively). Main points of the rebuttal were:

i) The FWS previously responded to MDEQ's public notice with a letter dated January 14, 1994 stating there were no listed species within the project area. The project consultant walked the property on numerous occasions and has not seen the Indiana Bat. In addition, there are no laws, regarding wetland regulations. These materials, as well as other alternative arguments discussed in the court sessions have been provided (Encl. 14).

ii) The feasibility materials were provided in the Administrative Law trial and establish compliance with applicable statutes and regulations. These materials, as well as other alternative arguments discussed in the court sessions have been provided (Encl. 14).

II. Environmental Setting:

A. Description of the Area: Lake St. Clair is part of the Great Lakes drainage system, lying between the St. Clair and the Detroit Rivers. The Lake is bounded by S.E. Michigan and the province of Ontario area land use is primarily residential with agriculture prevailing to the north and heavy industry nearby in the Detroit Metropolitan area. This proximity to the Detroit population center, coupled with abundant water-based recreational opportunities afforded by Lake St. Clair and connecting waterways, generates a great demand for marinas, and waterfront and canal developments. Macomb County has experienced a population increase

of 3.3% from 1980 to 1990 (694,6000 to 717,400), while Chesterfield Township experienced a 43.3 % increase (18,232 to 25,905) during the same period.

At the time of the glacial retreats, Lake St. Clair extended well inland from its current location, thereby rendering a large portion of Macomb and St. Clair Counties as lake bottom. This accounts for the large expanses with little topographical relief in the county. As the shoreline receded to its current location, minor beach ridges remained behind which were many wetland pockets. Most of these pockets drain towards the any arms of the lake which extend up to many miles inland.

B. Waterway Characteristics: Shorelines in the area are, for the most part, armored with the exception being a fairly large wetland area located approximately 7 miles away near the mouth of the Clinton River. The Clinton River is the largest river flowing through the County with a drainage area of about 734 square miles. Its average flow is 523 cfs and the maximum-recorded discharge was 21,000 cfs. The Belle and Salt Rivers along with Black and Swan Creeks contribute to the area's drainage but possess considerably smaller drainage areas than the Clinton River. Water levels in Lake St. Clair can fluctuate up to five feet over a long-term basis, causing significant shoaling problems during low levels, and high flood damages during high levels. Water quality is considered fair and safe for body contact during most times of the year. Combined sewage/storm water outfalls, particularly from the Clinton River, tend to discharge contamination into the lake after storm events causing officials to close the public swimming beaches due to high coliform courts.

C. Project Area: The project site is located approximately one mile from the shoreline of Lake St. Clair proper. The property is a 19.61 acre triangular shaped parcel containing mostly forested wetland. A ditch has been excavated along the southeast portion of the property (the hypotenuse of the triangle) that runs into the Sutherland-Oemig Drain, which empties into Auvase Creek, which then empties into Lake St. Clair. A total of three site inspections have been performed on the property. The first on October 12, 1999 for permit evaluation purposes; the second on May 5, 2000 for migratory bird use documentation; and the third on August 1, 2000 to determine if the area contained Indiana Bat habitat (Encls. 15, 16, 17, respectively). Due to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well.

1. Cultural Characteristics: Presently, there are no structures on the site. The site is bordered by Donner Road to the west, beyond which is a large residential subdivision between the site and Interstate 94; a vacant field to the north, beyond which lie several condominium and apartment complexes between the site and 23 Mile Road; a residential subdivision to the south continuing on to Lake St. Clair; and a vacant woodlot to the east, beyond which lie several residential subdivisions and then a large woodlot, slated for development into a residential subdivision.

2. Physical/Chemical Characteristics: There is no evidence of any existing erosion problem/flood damage

at the site, although there is evidence of ponding, i.e., watermarks on trees, and water stained leaves on the forest floor. Wetlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area. Spoils from the ditch were side cast, creating a dike which serves to block immediate drainage out of the parcel and holding water until its is quite high. By holding the water which falls onto the approximately 20 acre site and preventing it from immediately entering the surface water system, flood peaks to downstream areas are reduced.

Soils within the proposed work area consist of very friable clay loam at the surface beneath which are primarily clay soils.

3. Biological characteristics:

a. The Existing/Long term Vegetation and Habitat values for each portion of the work site are as follows:

Upland portions of the property: Of the 19.61 acres on the parcel, less than four acres are designated upland. A small, 200' deep, triangular shaped area in both the southwest and northeast corners of the triangular shaped lot and an upland ridge between the two formed as a result of side casting from the excavation of the 1,8000' ditch alongside the southwest to northeast side of the lot represent the limit of the uplands. Running parallel and adjacent to this upland ridge is an overhead power line with utility poles. The utility corridor has been kept trimmed of trees so that only small woody and herbaceous vegetation remains. The area is heavily vegetated with deciduous shrubs, including different

species of berries, and wild grapevines. The uplands at either end of the lot are densely vegetated with shrubs, saplings and trees. These upland areas on site provide romping, resting, and feeding habitat for a large variety of mammals, resident and migratory passerine birds, raptors and game birds, as well as amphibians and reptiles. The area acts as a green space within an area that is heavily populated on three sides. White-tailed deer were seen running between the wetlands and uplands on this site during two of the site visits. The upland areas in two of the three corners of the parcel are not slated for any development and, in fact, are to remain in their natural state. It appears as though the upland adjacent to the ditch will be graded for landscaping purposes (see Encl. 1).

Wetland portions of the property: The wetlands located on the parcel are forested and likely provide for wildlife diversity/abundance and aquatic diversity/abundance due to the fact that there is evidence of ponding for long periods of time, it is a large parcel relatively void of human disturbance, and it is in the middle of an area where most surrounding uplands and wetlands have been farmed and/or filled for residential construction. The area shows evidence of ponding in large areas for long enough periods to stain leaves on the forest floor and to create watermarks on trees. There are large numbers of deadfall trees and many trees with buttressed trunks, a morphological adaptation for surviving in saturated soils. There is very little in the way of understory within the woodlot. Many migratory birds were noted within the wetland areas as well as whitetail deer and evidence of other small mammals, i.e., scat and tracks. The wetland provides excellent habitat for large and small mammals,

resident and migratory birds, and amphibians and reptiles.

Riparian portions of the property: There is a ditch, which, during one undocumented site visit, contained standing water. The ditch empties into Sutherland-Oemig Drain, which has flowing, water year round. The ditch has scrub/shrub vegetation running along both sides and provides excellent land/water transition zone for all wildlife. It appears as though the ditch itself will not be altered except that a connection between the enhanced areas will be installed thereby making it more likely to have standing water in the ditch for longer periods, or even permanently.

Shallow Bottom areas that are seasonally/permanently inundated: The wetlands show evidence of standing water for long periods of time. It is likely this occurs during the spring at snowmelt, and/or at other times of the year after storm events. There is much detritus in these areas, as well. The area provides good habitat for benthic organisms important in the aquatic, and terrestrial, food chain.

Water Column of inundated/ponding areas: The primary area proposed for work is not accessible by fish due to the upland ridge alongside the ditch. According to the watermarks on the trees, depth of standing water on the interior of the lot is up to two feet. It likely provides good habitat during times of ponding/inundation for aquatic organisms important in the aquatic food chain.

b. Ecological context of proposed work site: The woodlot is one of the few remaining wetlands, indeed

forested wetlands, within Chesterfield Township, in relative close proximity to Lake St. Clair. It is along an established migratory flyway and provides a necessary refuge/stopover point for many resident and migratory species. These stopover points are being pushed further and further from the open waters of Lake St. Clair through residential development pressures. At one time it is likely that the entire perimeter of Lake St. Clair resembled the subject property, however, timber harvesting and agriculture greatly reduced that area and now, residential development pressures, only a few large woodlots remain within Macomb County.

III. Environmental Impacts of the Proposed Action

A. Identified Physical Impacts

1. Effects on Water Quality

a. Construction Impacts:

The proposed construction will occur landward of the Ordinary High Water Mark of Lake St. Clair in Sutherland-Oemig Drain (S-O Drain). All project-associated excavated, graded, and filled areas would be subject to erosion into the drain along the NE to SW property line and into the S-O Drain, thereby causing negative impacts to water quality until the areas are stabilized. The proposed activities would cause minor temporary degradation of water quality. In order to minimize the detrimental construction impacts the permit could be conditioned to require use of silt curtains around the work area and adequate containment and stabilization measures for upland work and equipment use areas.

b. Operational Impacts:

The proposed work would destroy/adversely impact an area that retains rainfall and forest nutrients and would replace it with a new source area for runoff pollutants. Pollutants from this area may include lawn fertilizers, herbicides, pesticides, road salt, oil, and grease. These pollutants would then runoff directly into the waterway.

All of the wetlands on this parcel are slated for either development into residential housing, or excavation for a storm water detention basin, or excavation for Enhancement of the existing remaining wetlands as mitigation.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may serve to capture some of the pollutants found in the runoff since the storm water detention basin draining the new complex would empty into these areas.

We also note that due to the existence of the spoil berm along the drain and other surrounding features, this wetland has been obstructed from receiving runoff from surrounding areas and from circulation by flooding in the drain. The site still has a very high potential to provide runoff storage if these artificial barriers are removed. The proposed fill would permanently remove this potential.

Overall, the operation and use of the proposed activity would have a major, long term, negative impact on

water quality. The cumulative impacts of numerous such projects would be major and negative as the few remaining wetlands in the area are developed.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease water quality impacts; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a significant reduction in the area of fill to reduce those impacts to a minor level.

2. Shoreline Erosion and Accretion Effects:

The project would eliminate the potential ability of the wetland to act as a sediment catch basin. Increased runoff due to the filling of the wetlands and creation of impervious surfaces, i.e. condominiums, driveways, roads, etc., could increase erosion and/or sedimentation in the S-O Drain, Auvase Creek, and Lake St. Clair. The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex would empty into these significantly smaller areas, quickly overtopping them. These wetlands would then empty into the drain and most functions served by the existing forested wetlands would not be replaced. The project would contribute to increased runoff and would likely result in increased erosion and accretion along the drain and further downstream in Auvase Creek.

In summary, the project will have minor, long term, negative impacts on erosion/accretion. The cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in Chesterfield Township to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease impacts to downstream erosion/accretion; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a significant reduction in the area of fill to reduce those impacts to a minor level.

3. Effects on Flood Hazards and Floodplain Values:

The proposed project would aid in the prevention of flooding for the applicant and authorization of such a project would encourage the applicant to invest in a parcel that shows evidence of flooding/standing water conditions. Because there is limited acreage remaining in the Chesterfield Township area which provides for storm water storage and delayed release of these waters, it is likely that the downstream areas will see an increase in possible flooding magnitude and frequency. This is due to the fact that there will be a net increase in runoff since the parcel is not currently a part of the S-O Drain watershed. Construction of the project and similar projects could have detriments to downstream residents.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex is proposed to empty into these significantly smaller areas, which will quickly exceed their storage capacity. These wetlands would then empty into the drain and the functions of water storage (from precipitation) served by the existing forested wetlands to would not be replaced (See drawing Pages 4-8 of Enclosure 1).

In summary, the project will have minor, short term and long term, negative impacts on flood hazards and floodplain values. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be avoided if the permit were denied.

4. Effects on Navigation

No impacts would be expected.

5. Water Supply and Conservation

No impacts would be expected. There are no water intakes in the area likely to be affected, and we anticipate no impacts to any drinking water aquifer.

B. Identified Biotic Impacts

1. Effects on Aquatic Biota

For most of the year the wetlands on the site do not support standing water and hence do not normally have active aquatic biota. However, during the spring flooding, standing water can persist for weeks at a time, and opportunistic aquatic biota such as tadpoles, macroscopic crustaceans and other invertebrates, as well as an assortment of vegetative forms such as duckweed (Lemna sp.) may be present. The proposed activity would eliminate this habitat, and disrupt, isolate, and fragment adjoining mitigation areas that are not eliminated, thereby permanently destroying the associated aquatic vegetation and invertebrates in the filled areas, and isolating and stressing the ones in the mitigation habitat. Some short lived, opportunistic benthic communities that take advantage of standing flood waters in wooded areas to complete their life cycles, and sedentary life stages, and as well as the eggs of each would be directly buried or removed by the proposed activity.

The release of contaminants to the ecosystem due to both the construction activities and releases associated with the subsequent residential development may adversely affect aquatic biota in their various stages, including adult, juveniles, larvae, eggs, and dormant stages in the remaining adjacent mitigation area, the adjacent drain, the S-O Drain, and Auvase Creek.

The net result of the proposed discharges are replacement of increasingly rare seasonally flooded wooded aquatic habitat in the area by increasingly abundant residential development. This results in an overall decrease in aquatic biota diversity and productivity.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some habitat for aquatic biota; however, the organisms that repopulate these wetlands would likely not be the same as those destroyed or removed as a result of the project as the wetland habitat will be significantly changed.

In summary, the project will have minor, long term, negative impacts on the aquatic biota. The cumulative impacts of numerous such projects would result in major, long term, negative impacts to this type of aquatic biota, and is evident within Chesterfield Township that most areas that have been developed to the point that they no longer have any appreciable seasonally flooded wooded wetlands left, nor the aquatic biota community normally found associated with these areas.

The negative impacts would be avoided if the permit were denied. The negative impacts would be increasingly reduced if the scope of work was reduced and discharges in wooded wetlands avoided. Upland alternatives appear to be available in the area that would avoid discharges in wooded wetlands, and would avoid or minimize negative impacts to aquatic biota.

2. Effects on Terrestrial Biota

The project would eliminate and alter reproductive, foraging, and resting habitat for perching birds, woodpeckers, game birds, raptors, some waterfowl, and small and large mammals, as well as for reptiles, amphibians, and invertebrates, which are important in

the food chain. It is possible that these wooded wetlands also serve as a travel corridor and cover for some mammals and avian species between adjacent agricultural fields and wooded lots to the east of S-O Drain.

The upland ridge habitat along the drain and in the corners of the parcel is the only uplands on the parcel. During the wet time of the year when the site holds standing water, the ridge may be the preferred location for dens for burrowing animals.

A variety of organisms would be displaced from their habitat by impacts of the proposed construction and its resulting use. Those displaced organisms will not cause degradation of habitat values for those areas to which they will be driven. However, there is an extremely limited quantity of equivalent habitat in the area. The project site is one of the last remaining large wooded wetland parcels in Macomb County, let alone Chesterfield Township. The adjacent property to the east contains wooded lands, which may or may not be wetlands. This parcel is likely slated for development, as well. Wildlife may not be accommodated if driven from the project site to these last remaining areas.

Recolonization of the project area by similar species would not be expected to occur after construction. The natural habitat would no longer exist. The newly created landscaped upland would furnish habitat for those few species adapted for life under these conditions. At the fill borrow site, terrestrial plants and habitats would be destroyed by excavation operations. The net exchange of habitats that are increasingly rare in the area for habitats that are

abundant will result in an overall decrease in terrestrial biota diversity and productivity.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some habitat for terrestrial biota; however, the species that repopulate these wetlands would likely not be the same as those destroyed or removed as a result of the project as the habitat type will be significantly different.

In summary, the project will have major, long term, negative impacts on the terrestrial biota. The cumulative impacts of numerous such projects results would be a notable decrease in the quantity and quality of terrestrial wildlife. This may be observed in similar areas that have been extensively developed for residential and/or commercial use and no longer have wooded wetlands, nor their diverse and extensive native wildlife populations.

The negative impacts would be avoided if the permit were denied. The negative impacts would be increasingly reduced if the scope of work was reduced and discharges in wooded wetlands avoided.

Alternatives exist to the proposal that include use of agricultural uplands within the Township/County for residential home sites. These alternatives, or similar ones, would have negative impacts on terrestrial biota, but not as severe as with the proposed work.

3. Effects on Wetlands

The following type and areal extent of wetlands would be eliminated or covered as a direct result of the proposed discharge:

Type	Size (Acre)
PF01	15.96

The following type and areal extent of wetlands would be eliminated/deepened as a direct result of the proposed dredging:

Type	Size (Acre)
PF01	3.74

Recognized wetland functions which would be affected as a result of the project are: flood water storage, natural drainage, runoff filtration and purification, food chain production, and general habitat and nesting, spawning, rearing and resting sites for aquatic and terrestrial species. Wetland values affected include uniqueness, in that this is one of the last remaining such sites in Chesterfield Township/Macomb County; and heritage, which will be lost if the forested wetlands are destroyed by development.

Each of these functions has been objectively documented for the particular site by means of information as described in Section II.C. above.

The applicant proposes compensatory mitigation, which would result in the substitution for 3.74 acres of existing forested wetlands on the parcel. The mitigation involves the removal of all vegetation in these areas and excavation of two to three feet of wetland soils to create emergent wetlands in these areas. These would receive runoff from the storm

water detention basin in the center of the parcel and would in turn runoff into the drain that runs along the NE-SW property line and then empty into the S-O Drain. As discussed in the sections above, functions which are presently provided by the forested wetlands would not be replaced. The proposed compensatory mitigation will not provide functional replacement of the wetland to be impacted by the proposed project for the future.

In summary, the project will have major, short and long term, negative impacts on wetlands. The cumulative effects of such actions may also result in major impairment of wetland resources. Negative impacts can be avoided if the permit is denied, and residential housing is located on available uplands within the Township/County. Negative impacts can be greatly reduced if the permit is severely modified to place a few condominium structures on the upland along Donner Road. This modification would avoid loss of the forested wetlands. If a minimum fill area is required, compensatory mitigation design efforts could also explore the possibility and benefits of removing the berms and other features which presently isolate the wetland from the S-O Drain and receiving waters.

4. Effect on Conservation and Overall Ecology:

Implementation of the proposed activity would impact upon the ecological balance and integrity of a valuable resource: forested wetlands, cover areas, floodplains, and a migratory bird stopover and foraging point. The proposed project would change an area that now supports a variety of species into one that would probably support considerably less diversity. The

proposed work and subsequent operation could lead to gasoline or oil spills, or releases of various residential pollutants such as solvents, soaps, fertilizers, salts, etc., which could result in major adverse impacts. The proposed work would degrade or foreclose the prospect of preservation of an area of high natural heritage value.

Federal and State endangered species lists were consulted. The following endangered or threatened species are known to suspected occur in Macomb County in similar habitats:

Indiana Bat Myotis sodalist

The FWS requests that if it is determined a federal permit can be issued for the project, a survey for the species and its habitat on the parcel be conducted by a qualified individual and provided to them for review. Further, they request that consultation with FWS be completed prior to issuance of any permit in order to ensure impacts to the species are avoided to the greatest extent practicable, or minimized and mitigated.

In summary, the project will have major, short and long term, negative impacts on conservation and the overall ecology. The cumulative impacts of numerous such projects can already be observed in the vicinity where residential development has intruded into forested wetlands, resulting in their loss and fragmentation, been the source of introduced pollutants, and decreased wildlife use and diversity. The negative impacts would be reduced greatly if the permit were denied, and

residential construction were diverted to available uplands in the Township/County.

C. Identified Social Impacts

1. Visual Aesthetics

The proposed work is somewhat consistent with similar type structures found in the area in that most of the area was at one time forested wetlands and nearly all of the residential structures intruded on the wetlands. The development will destroy vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area.

The construction activities will be noticeable from the Donner Road and the immediately adjacent area to the north and south where there are currently condominiums and a residential subdivision, respectively. Beyond this limited area, the proposed work will not be visible. The project may detract from the visual context of the forested wetlands. After project completion, this project will transform an area that may be characterized as undeveloped to one which may be characterized as residentially developed. The net impact of this transformation will depend on individual taste. The construction activities will cause a change in the aesthetic qualities of sight, taste, odor and color of the water and air around the project area.

In summary, the project's effect on aesthetics would be minor, long term, and dependent on personal preference. The cumulative impacts of numerous such projects would be major, long term and again, dependent on personal preference. These cumulative

impacts may be observed elsewhere along Donner Road and throughout the Township where forested wetland tracts have been subdivided and filled for residential developments. Adverse impacts can be minimized if the permit is denied, or modified to allow development of the upland ridge along Donner Road.

2. Noise

Construction activities, including both house and road work, will increase ambient noise for the duration of the work. After construction, use of the project area will create a negligible change in noise levels for receptors located in the immediately area. These would consist of vehicles entering and exiting the parcel and yard power equipment and other residential noise sources such as voice and music. It may be expected that this added noise would occasionally reach the adjacent receptors. The increase is not expected to violate applicable noise criteria.

Within the forested wetlands, however, the project use will be contrary to the tranquil setting of the area. The noise producing activities and other disturbances of residential development use would negatively impact the wildlife remaining in the adjacent areas designated to remain in their natural state.

In summary, the project's effect on noise would be minor, both short and long term, and negative. The cumulative impacts of numerous such projects would be major and negative. Adverse impacts cannot be minimized if the permit is issued.

3. Designated Historic, Cultural, Scenic, and Recreational Values

The up-dated National Register of Historical Places was checked. Registered Historical sites would not be affected by the proposed work. The proposed work would not affect an area designated under the Federal Wild and Scenic Rivers Act, or being considered for such designation. The proposed work would not affect areas designated as Natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, archaeological resources, including Indian religious or cultural sites. We know of no applicable or affected state, regional, or local land use classification due to historic, cultural, scenic, or recreational values.

4. Land Use Patterns

The proposed project is consistent with the existing zoning for the area. The state permit attests to compliance with state government view on land use. From a national perspective, the work may encourage a continuing trend of conversion of wetland areas to upland residential development and a trend of development of natural areas rather than recycling abandoned, previously developed areas, or agricultural areas to more intensive or better uses. The proposed work is in a somewhat natural area in that previous disturbances are so many decades ago that the natural vegetation and community has recovered and reestablished itself.

The area has historically been agricultural. In recent years, residential development in Chesterfield Township, as well as all of Macomb County, has entered the area resulting in sites of more concentrated residential development, often at the loss of agricultural fields which had once been wetlands. As such, the proposed work would perpetuate this recent change in land use patterns, but at the expense of remaining forested wetlands rather than tiled and drained agricultural land. Hence, the proposed work would result in a change to cultural development.

In summary, the project's effect on land use would be minor, long term, and negative. The cumulative effect of the change that this supports would be major, long term, and negative. Adverse impacts can be avoided if the permit is denied, and minimized if construction is restricted to the uplands along Donner Road, or use of primarily upland agricultural fields within Chesterfield Township/Macomb County.

5. Economic Effects

The contractor, equipment supplier, and other commercial enterprises would benefit from the proposed work. The applicant's property value would stabilize or increase as a result of the proposed work. Increased use of the area could benefit local businesses. The local tax revenues, community services, community cohesion would benefit. The proposed work would provide the applicant with an improvement in his interests, which would result in an economic gain. In summary, the project's effect on economics would be minor, short and long term, and positive.

6. Effects on Recreation

The proposed work would destroy an area, which is important to maintenance of populations of game, although it is not in itself open to public use for hunting and fishing. The project would destroy an area of value for passive recreation such as photography, bird watching, walking, and the like.

The project would cause an increase in the number of people in the area, who may in turn degrade existing public recreational facilities in the area. In summary, the project's effect on recreation would be minor, long term, and negative. The cumulative impacts on public recreation would be major and negative as can be observed through the Chesterfield Township area. Adverse impacts can be avoided if the permit is denied or minimized if the permit is extensively modified to restrict development to the upland along Donner Road. This would allow for the continued maintenance of populations of game and use, albeit on private property, of the area for photography, bird watching, walking, and the like.

7. Effects on Safety

During construction and as a result of use of the project, increased numbers of people in the area will increase vehicular traffic and the frequency of accidents. In summary, the project's effect on safety would be minor, long term, and negative. The cumulative impacts of numerous such projects would be minor and negative. Adverse impacts can be minimized if the permit is denied or extensively modified to

restrict development to that number of units which would fit in the upland along Donner Road.

8. Food and Fiber production

No impacts would be expected.

9. Mineral Needs

No impacts would be expected.

10. Energy Conservation and Development

No impacts would be expected.

11. Consideration of Property ownership

The applicant has a right to reasonable private use of the property, subject t the rights and interests of the public in the waters of the United States, including federal navigation servitude and federal regulation for environmental protection. The project will have benefits to the applicant's right to property ownership. A severely downscaled plan would also afford use of the property.

D. Cumulative Effects

For the purpose of this application review, the geographic area for which cumulative effects are being reviewed is Macomb County. The development activities epitomized by this application are discharges of fill material in wetlands for residential construction. Within this area, the Corps of Engineers has issued one Nationwide 29 permit for fill in 6171 square feet of wetland for construction of a residence and two

individual permits. One standard permit was for discharge in 0.32 acres of wetlands with mitigation and the other permit has not been finalized yet, but proposes 0.58 acres of wetland fill with preservation. This latter permit was downsized from an initial request to fill 6.35 of the 8.5 acres of forested wetlands on the 57.0 acre forested site. A third application is in its initial stages for fill in a 25 acre forested site, approximately 10 acres of which are forested wetlands. It is evident, through visual reconnaissance, as well as review of aerial photographs and historical records, that Chesterfield Township, as well as most of Macomb County, has been and remains under tremendous development pressure. Cumulative impacts to forested wetlands due to this type of development has been major and negative. Few continuous woodland parcels, such as the subject parcel, remain in the Township or the County.

In situations where alternatives not involving alteration of wetlands were practicable, proposals have generally been denied.

Similar permit requests may be anticipated if this permit is issued. The Detroit District is currently in the pre-application stage for a similar application for residential development in a 27 acre wooded parcel within two miles of the Carabell site. In addition, there is an empty woodlot immediately across Sutherland-Oemig Drain to the east that may also be subject t similar development pressures. This project will set a precedent because permits are generally not issued for residential subdivisions when there are upland alternatives. Cumulatively, the work would have major adverse impacts as described in the sections above.

The buffering/cleansing ability of wetlands is beneficial to the areas' surface waters. Numerous projects such as this has seriously reduced water quality, habitat, and overall value of the regions lakes and streams.

Activities of this type may change the natural drainage or flushing characteristics of the waterway or its adjacent wetlands.

As a result of the proposed work and other similar projects, this area has experienced an influx of people. This influx has resulted in the destruction of wildlife or fish habitats, increased noise and litter problems, and/or additional environmental impacts (e.g. air pollution, etc.). These impacts may

become significant.

E. General Criteria:

1. The relative extent of the public and private need for the proposed structure or work: The agent for the applicant submitted a copy of Court transcripts from the MDEQ Contested Case Hearing before Administrative Law Judge Richard A. Patterson on the 27th day of October, 1997 wherein his witness states there is a demand for 150 senior units. He based this on a study conducted by his company "last year" [1996] (Encl. 17, Page 167). There is no other demonstrated public need for the project. Presumably, seniors are able to locate a reasonably priced dwelling anywhere within the county. The applicant has a perceived private need to see a return on his investment. There has been no demonstrated private need for the proposed work.

2. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the object of the proposed structure or work: There is an extremely limited, and quickly diminishing, supply of forested wetlands remaining in Chesterfield Township and Macomb County. Sufficient uplands exist within the county for development of multiple residential structures. These may be currently zoned for residential development or a zoning variance could possibly be passed for development on agricultural land in the area. Additionally, the agents witnessed also testified that there, at the time of the Contested Case Hearing, was another available parcel within Chesterfield Township (See Encl. 17, Page 166). Clearly, a less environmentally damaging alternative to forested wetland destruction and resource loss is available.

3. The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited: The proposed project would permanently destroy most of a parcel of forested wetlands. Another portion would be changed as mitigation for the loss of functions. The work would alter public use of the property, but such use is not presently authorized on the property. While the work would provide greater private use of the area, there are other uses for forested wetlands that can be realized without the construction of the residential home sites.

F. Alternatives: The following alternatives have been considered:

Issue the permit as proposed.

Issue the permit with modifications.

Issue the permit with special conditions. As mentioned in paragraph III.A.1.a. above, a permit with special conditions to control sedimentation during construction, will minimize negative construction impacts due to erosion, while fulfilling the project's purposes and beneficial effects on the economy.

Deny the application. (Consider the no action alternative.) The No Action alternative would prevent the avoidable loss of forested wetlands for non-water dependent residential home construction. This alternative would not prevent the applicant from pursuing the construction of new condominium or apartment complexes since the forested wetlands are not the only available land in the Township and/or County.

IV. The portions of this document constituting the Environmental Assessment adequately address the relative magnitude of the expected impacts of the proposed project within our mandatory scope of analysis. The range of possible impact magnitude included no impact, minor impact, major impact, and significant impact as the term significant is defined in regulations implementing NEPA. Our analysis did not indicate the potential for significant impact on the quality of the human environment. Therefore, I do not recommend preparation of an environmental impact statement.

V. 404(b)(1) Guidelines Compliance Evaluation:

The effects of the proposed discharge of dredged or fill material into the waters of the U.S. have been evaluated according to the Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, promulgated in Title 40 CFR 230 pursuant to Section 404 of the 1977 Clean Water Act.

Factual Determinations in light of Subparts C-F of the Guidelines have been set forth under appropriate impact assessments above.

Testing: Subpart H of the Guidelines requires testing of the extraction site of the discharge material for contaminants except under certain circumstances. These include the existence of prior test results, scientific research and/or experience that indicates that contaminants are not present in the material to be discharged. Testing may also be omitted if the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar.

Testing may also be omitted if constraints are available to reduce contamination to acceptable levels, and if the potential discharger is willing and able to implement such constraints. In this case, testing is not required because it has been indicated that the fill material will come from a commercial source.

Mitigation/Alternatives:

The following is a summary of the mitigation sequence as required by the February 10, 1990 Memorandum of Agreement by the EPA and the Corps as it pertains to the proposal and, if applicable, its alternatives.

Avoidance

The proposed discharge would occur in a special aquatic site, a forested wetland. The fundamental, essential, or irreducible activity or use to which the special aquatic site will be put after discharging dredged or fill material and construction ("basic purpose") is shelter, which, per se, does not require access or proximity to or siting within forested wetlands to take place. Therefore, we must presume that there are practicable alternatives to achieve the overall project purpose that do not involve special aquatic sites, and that all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site have less adverse impact on the aquatic ecosystem. The applicant responded to this presumption. Based upon this response, the applicant has not demonstrated satisfactorily that a less damaging practicable alternative does not exist.

The applicant did not adequately address avoidance of wetlands, the first necessary sequence in the Section 404 (b)(1) guidelines. As their alternative analysis, the applicant submitted contested case hearing transcripts indicating there is only one other parcel in Chesterfield Township zoned for multi-family development. They did not explain why they could not pursue use of this parcel. They also failed to address the availability of other upland parcels, the possibility of seeking and being granted zoning variances within the Township, the use of several smaller parcels instead of one large parcel, or change in design to fit the available zoning. This presumption must be overcome before moving to the second hurdle in the Guidelines.

Minimization

The applicant failed to offer an explanation as to why what little upland is available on the parcel could not be fully utilized, thereby minimizing impacts to the wetlands on-site. As described in the sections above, we have identified steps to minimize impacts. We have determined that these steps are appropriate for the reasons specified in those sections, presuming the applicant can make an acceptable argument to meet the avoidance criteria first.

Compensation

The applicant has proposed an exchange of existing forested wetlands through excavation of a small area of forested wetlands to create emergent wetlands (marsh) and open aquatic areas. We determined that this would not be adequate functional replacement.

Section 404 (b)(1) compliance summary matrix

P = Proposal. D = No action (denial). A1, A2 = Additional alternatives, if any. Where only a P is shown, it indicates that all alternatives meet compliance criteria for that item. An unknown is a noncompliance; this will be designated with a U in the DOES NOT COMPLY column.

	MEETS CRITERIA	DOES NOT COMPLY
1. The applicant must overcome the presumption that a practicable, less environmentally damaging alternative site, outside special aquatic sites, exists. If the project is water dependent, OR is not in a special aquatic site, enter only N/A (not applicable).	D	P
2. There must be no alternative that is practicable, is less damaging to the aquatic ecosystem,	D	P

	and has no other significant, adverse environmental effects.	
3.	The discharge must not violate state water quality standards or Clean Water Act Section 307 toxic effluent standards or bans.	P
4.	The project must not jeopardize the continued existence of an endangered species.	P
5.	The project must not cause or contribute to significant* adverse effects on municipal water supplies, plankton, fish, shellfish, wildlife, special aquatic sites, or other aspects of human health or welfare.	P

6.	The project must not cause or contribute to significant* adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems.	P	
7.	The project must not cause or contribute to significant* adverse effects on ecosystem diversity, productivity, or stability.	P	
8.	The project must not cause or contribute to significant* adverse effects on recreational, aesthetic or economic values.	P	
9.	All appropriate and practicable steps, to minimize potential adverse effects of the	D	P

discharge on the
aquatic ecosystem,
must be taken.

*If project does not comply due to this, explain if this determination differs from conclusion regarding an EIS, Section IV. above.

Section 404 (b)(1) Compliance/Non-Compliance Determination

The proposed discharge fails to comply with the 404 (b)(1) Guidelines because it appears that there is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, and the alternative does not have other significant adverse environmental consequences. The applicant has not supplied sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines (40CFRPart230.12 (a) (3) (iv)).

RICHARD J. POLO JR.
LTC, EN
Commanding

Prepared by:

Robert D. Deroche
Project Manager
Permit Evaluation Branch B
Date: 11 September 2000
Enclosures

1. P.N. dated 8 February 2000
2. EPA ltr. dated 7 March 2000
3. FWS ltr. dated 14 March 2000
4. MDEQ ltr. dated 22 February 1994
5. MDEQ FDO dated 30 September 1998
6. MDEQ permit issued 13 November 1998
7. SHPO ltr. dated 7 June 2000
8. MCPA ltr. dated 14 March 2000
9. DWSD ltr. dated 26 January 2000
10. LSAC ltr. dated 17 January 2000
11. Corps ltr. dated 20 March 2000
12. Agent ltr. dated 28 March 2000
13. Agent ltr. dated 23 May 2000
14. MDEQ Hearing Transcripts from 27 October 1997
15. Insp. report from 12 October 1999
16. Insp. report from 5 May 2000
17. Insp. report from 2 August 2000

Reference Materials used in compiling this Assessment include:

USGS topo quad for New Haven, Mich. #48B
NOAA Chart No. 14853
Endangered Species List
National Register of Historical Places
USDA soil survey for Macomb County, MI, issued September 1971
Site Investigation
Ground Photography
Register of Natural Landmarks
Wild and Scenic Rivers Act
404 (b) (1) Guidelines
Fish and Wildlife Service Wetland Inventory Maps

Census Data
Department of the Interior National River Inventory

DEPARTMENT OF THE ARMY
DETROIT DISTRICT, CORPS OF ENGINEERS
BOX 1027
DETROIT, MICHIGAN 48231-1027
October 5, 2000

IN REPLY REFER TO

Engineering & Technical Services Regulatory Office
File No. 99-250-002-1

Keith and June Carabell c/o Tim Stoepker.
Abbott, Nicholson, Quilter, Esshaki and Youngblood
300 River Place, Suite 3000 Detroit, Michigan 48207 .

Dear Mr. and Mrs. Carabell:

I have reached a decision on your application for a Department of the Arm permit to discharge fill material for construction of a condominium development in wetlands at Chesterfield Township, Michigan. After due consideration of the record and the appropriate regulations, I have determined that the project is contrary to the overall public interest, and have decided to deny your request for a permit.

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site. provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the

region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

This decision was also based on an evaluation of the project's compliance with the 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The Guidelines were developed by the U.S. Environmental Protection Agency pursuant to the 1977 Clean Water Act, and they establish criteria for evaluating proposed projects. The Corps of Engineers is obligated to deny applications for discharges when work does not comply with the Guidelines. One critical threshold of the Guidelines is a thorough consideration of less damaging practicable alternatives.

For projects such as yours, the Guidelines require that, we presume that less damaging alternatives are available unless clearly demonstrated otherwise. You have not overcome this presumption, and therefore your project does not comply.

One apparent less damaging alternative would be to purchase an upland, or primarily upland, parcel of property elsewhere in the Chesterfield Township area that may be zoned or, re-zoned for multi-family residential development. There may be other less damaging alternatives, as well. If there prove to be none, we would give favorable consideration to a project that significantly reduces impacts to the forested wetland on your property, such as construction along Donner Road

that utilizes the upland to the maximum extent possible. We would also require the mitigation to provide for the complete functional replacement of the forested wetlands proposed for development.

You are hereby notified that you and/or your authorized agents) may appeal a denied individual permit under the Corps of Engineers Administrative Appeals Process. Should you wish to appeal this decision, you must fill in and submit the enclosed Request for Appeal (RFA) within 60 days of the date of this letter. Your RFA must be submitted to the division engineer at:

Brigadier General Robert H. Griffin
U.S. Army Corps of Engineers Lakes & Ohio River Division
P.O. Box 1159
Cincinnati, Ohio 45201-1159

Should you have any questions, please contact Bob Deroche at the above address or telephone (313) 226-6813. Please refer to File Number: 99-250-002-1.

Sincerely,
Richard J. Polo Jr.
Lieutenant Colonel,
U.S. Army District Engineer

Enclosures
Copy Furnished:
MDEQ, Livonia (93-14-602)

NOTICE OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Keith and June Carabell
File Number: 99-250-002-1
Date: October 5, 2000

Attached is : Permit Denial

See section below C

***

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps. of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

***

CELRE-ET-RG 99-250-002-1 (1145b)

October 5, 2000 MEMORANDUM FOR Record

SUBJECT; Statement of Findings on Proposed Discharge in wetlands at Chesterfield Township, Michigan by Keith and June Carabell

1. Reference attached Environmental Assessment (EA) on the proposed work.

2. Summary/ Remarks

The agent for the applicant went on record, on two separate occasions as stating that the project is not within a state, or federally regulated wetland (See EA Enclosures 12 (Pg. 2, Para. 2.a.) and 13 (Pg. 1, 2nd Para.)). The record clearly Establishes the site as being used for interstate commerce (neo-tropical, migratory bird stopping point) and as adjacent, to a drain which empties directly into a Section 10 water (See Encl. 16).

The applicant offered an exchange of 3.74. acres of forested wetlands with the same acreage of emergent wetland as mitigation for the 15.87 acres proposed to be eliminated through the discharge of fill material. Compensation is, the final step in the sequence of avoidance, minimization and compensation. Since the presumption of avoidance has not been addressed and satisfied, the offer of compensation is premature.

The project will destroy one of the last remaining forested wetlands in Chesterfield Township, and one

of the last remaining large forested tracts of land in not only the Township, but also in Macomb County. Areas such as this forested wet land provide invaluable habitat for resident and neo-tropical migrant birds, as well as to the dwindling populations of small and large mammals in the area. Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed. Public recreation will suffer through a reduction in populations of bird's and mammals, many of which .are fed and/or photographed by people in this highly developed area. Although one of the applicant's expert witnesses in the contested case hearing states that a recent study reveals a need for 150 senior units within Chesterfield Township, at no time during the processing of this permit application did the applicant; or his agent, indicate the purpose of the work was to construct senior housing. Regardless, we presume that there is a less damaging alternative.

3. Conclusions and Determinations:

a. Compliance with the Section 404 (b) (1) Guidelines of the Clean Water Act: The proposed discharge fails to comply with the Guidelines.

4. Public Interest Determinations:

I determined that the project would have minor, long-term benefits to the economy of the area, as well as the applicant, and to property ownership. I determined that the project would have major, long-

term detriments to water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology. MDEQ has issued their respective permit, and, this reflects positively on the factor of land use.

Weighing the minor benefits that may be reasonably expected to accrue from this project against its reasonably foreseeable detriments, I determined that the detriments greatly outweigh the benefits to the overall public interest. Although MDEQ issued a state permit, land use benefits are outweighed by the total detriments to other national public interest factors. The cumulative impacts of this, and other similar projects would impact wildlife habitat and increase flood hazards, as well as, negatively impact the water quality of the receiving water. These become issues of overriding national importance and require a more stringent evaluation of alternatives and of minimization of impacts. The detriments of the project are therefore significant issues of overriding importance since they outweigh the benefits.

I have determined that the U.S. Department of the in Fish and Wildlife Service (FWS) request that a survey to determine the presence of Indiana bat (Myotis sodalis) or its potential habitat is unwarranted at this time. Consultation must be completed when, as a result of a federal action (in this case, issuance of a Section 404 permit), the Corps of Engineers makes an EFFECT determination. In this case, denial is overwhelming, as issuance of the requested permit would not, be in the public interest.

Therefore, resolution of this issue is unnecessary.

Should the applicant provide compelling reason why a permit should be issued, or submit a plan which significantly reduces impacts to the aquatic environment to a minimal level, the District will conduct consultation with the FWS.

5. Decision:

Review of this application has included all policies of paragraph 320.4, "General Policies for Evaluating Permit Applications." I have concluded that the determination as to denial of the requested permit is within my authority as set forth in 33 CFR Part 325.8. The proposal is contrary to the public interest and denial of the permit is appropriate, even though this decision is contrary to a state decision.

a. The requested permit is denied:

b. The applicant be notified of the decision.

RICHARD J. POLO, JR.
LTC EN,
Commading

[1]RE:
Wetland Application, Robert Leighton & Associates on behalf of June & Keith Carabell, et al,
File 99-250-002-1

PAGE 1 TO 79.

The Wetland, Application Hearing, Taken at 477 Michigan Avenue, Detroit, Michigan,
Commencing at 1:45 p.m., Tuesday, January 30, 2001,
Before Lucy Capobianco, CSR 3061

[2]APPEARANCES

TIMOTHY STOEPKER- Attorney at Law

SUZANNE CHUBB - Appeal Review Officer

ROBERT. D. DEROCHE - Biologist/Project Manager

CLIF SEIBER, P.E., Seiber, Keast & Associates, Inc.

ROBERT LEIGHTON - Robert Leighton Associates, Inc.

KEITH A. CARABELL - Carabell, Leslie & Company.
WALTER GAUTHIER

[3]Detroit, Michigan
Tuesday, January 30, 2001
About 1:45 p.m.

MS. CHUBB: I wanted to do a brief introduction of the conference, what to expect, what this conference is supposed to serve as and what will. happen after the

conference.

This is an informal conference. It is not a formal hearing as you may be used to under the Administrative Procedures Act. It is primarily to discuss the three appeal issues raised by Mr. Carabell and Mr. Stoepker. We can discuss anything that is currently in the district's administrative record, anything that was raised during their review process. This conference would serve to interpret, clarify or explain anything that is in the record and not raise any new issue since the date of the district's denial decision.

Following the conference, even though we are having a court reporter here, I am going to keep my own notes and I will still prepare a memorandum as the regulations require that I do, and I'll provide that both to the appellate and the district, a copy of my notes from the record as well as the record that is being taken by the court reporter. I will prepare a [4]recommendation to General Griffin. He is our division commander. He is the decision maker for the appeal process, and the decision deadline is March 4th, which is a Sunday. That is 90 days from the date we receive the request for appeal.

The decision document is a written document. It will address each of the three points of the appeal reasons separately, and the decision will be made on each point as to whether it has merit or does not and then there will be a discussion following each point explaining that decision.

If one of the points or all are found to have merit the – there is a remand back to the district. The division

engineer does not have the authority to override the district engineer's permit decision. That is not the purpose of this process. If there is a remand, there will be instructions back to the district engineer as to ways to correct the record or to reconsider a portion or-all of the decision.

My last point I believe I have already made but I will repeat it, is that the final permit decision following: the appeal process, if there is a remand, is still at the district engineers' level. So if there is a remand the district engineer will follow whatever instructions are in the decision document for the [5]appeal and then will make a final decision. And that will be the final decision :other than going to-court if there is still disagreement with that decision.

Does anyone have any questions?

MR. CARABELL: What is the timing of that-decision-that you just referred to?

MS. CHUBB : If there is a remand.

MR. CARABELL: I understand the March 4th, but if you remand it, what is the timing on that?

MS. CHUBB : There is nothing in the regulations that specifies a specific time frame where the district has to follow up with a final decision. It depends on what instructions are given. It could be minor things to be done or something major. It was left open for that reason because they couldn't take into consideration what all-could be in those final instructions, so there is no set time frame in the regulation.

MR. CAPABELL: Is there anything-in the law system that you know of regarding timing on that?

MR. STOEPKER: No.

MR. CARABELL: Who is engineer that is that person?

MS. CHUBB: Colonel Richard Polo Jr.

MR. CARABELL: Is this the one that wrote the [6]27 page thing?

MS. CHUBB.: He made the original district decisions.

MR. LEIGHTON: A General can't overrule him.

MS. CHUBB : No.

MR. LEIGHTON: The chain of command breaks down, I guess.

MR. STOEPKER : Understood.

MS. CHUBB : Did you have formal presentation or anything that you had planned at this point?

MR. STOEPKER : We thought we would-do the best thing we could do is probably go through the denial letter that was issued October 5th, 2000 and respond to the issues that were raised in there the best that we can noting the documents that we had submitted to the department and have Mr. Leighton and Seiber comment depending on appropriateness. of whatever those issue are.

And then since this is an informal discussion back and forth as relates to those issues. We did have our site visit this morning, walked the site at approximately 9:00. o'clock, and there was really very limited discussion out there as we went through.

So that was part of the procedure, was to go [7]out and do a site examination, and there were representatives, all of us -- about two-of us were there today. So Mr. Gauthier you were not there and Pat O'Connor was not there. The rest of us were at the site.

The best way I can do this is go through the response, and the response that was issued October 5th, 2000 from the Department of the Army back to my office and signed by a Lieutenant Colonel, Richard J. Polo; included the permit application process and then what was entitled Department of the Army Permit Evaluation Carabell Condos.

And then attached to that was a supplemental document memorandum for the record was also attached. Starting with the letter itself that was issued, one of the issues that we want to I guess make clear from the record, one the questions that was raised on page two of the letter had to do with the issue of an alternative site and whether or not there was an alternative site.

The second paragraph of the letter says one apparent less damaging alternative would be to purchase an upland or primarily upland parcel of property elsewhere in the Chesterfield Township area that may be zoned or rezoned for multi-family residential development, and I'm not sure whether or not the

department did any study to determine whether or not there was any such property that was available.

The record that we submitted to you which included the transcripts of the trial or administrative trial that was conducted by the state of Michigan, Department of Environmental-Quality; included testimony by the Chesterfield Township planner who is a consultant to Chesterfield Township. His name was Mr.-Maher, and his name was included within the document submitted to you. And Mr. Maher testified regarding this very issue and his testimony was that there was only one other subject property at that time that had a multiple family zoning designation within the Township, and there was no other property planned for that, and that we cited the transcript-pages there from his transcript of October 27th, 1997, pages 157, 167 of that transcript-through 212.

His testimony was that there was a demand within the Township for senior housing at least 150 senior housing type units that the subject property at issue met the criteria for such a development and for multi-family development, that the proposed RM-3 zones was consistent with their master plan-in the area. That the plan did not designate the subject property as [9]a park or other recreational facility. That the Township in 1987 in a prior multi-family application had advocated approval of a multi-family development on the site, and there was a significant demand within the community for multi-family development.

This was confirmed by Mr. Hernandez who was our market analysis. Mr. Hernandez is employed with Remax Realty. They were the number one residential

brokerage firm within the Macomb County area who confirmed there was no other available sites for multi-family development within the Township other than the one here that

MS. CHUBB: Was that strictly based on the current zoning?

MR. STOEPKER: Current zoning and master plan. We not only looked at the zoning ordinance, but within the Township itself they could only identify one potential area other than our subject, property that had the RM3 zoning, and where there would be RM3 permitted within the Township.

So what it amounted to is at the time the evidence was taken we had the one of the two parcels within the community that were available, and the community had designated units in excess of what we could build on our sites as required for multi-family.

[10]MS. CHUBB: Can there be revisions to the master plan?

MR. STOEPCKER: Well, certainly a master plan is subject to revisions over time. Chesterfield is a relatively built out community with commercial, single family and industrial and multi-family patterns already established pretty much, and the area that we look at here off Donner, for example, you would start off at 23 Mile and you have commercial on 23 Mile, and as it goes back in on the -- is it east, side of Donner, that is all multi-family, and then it abuts the Selfridge, multi-family -- Selfridge Air Force base multi-family residential area, and then you have single family across

the street.

So without exploring and the hit and miss, the best way for a developer or property owner to know whether or not the property is slated for either single family or multi-family or whatever, is, not only to look at the zoning ordinance map which is the law, what confines that, what can be built within the area, but you look at the long term plan.

To be supportive by law, the master plan has to have some kind of rationale to it. And the purpose of the plan is to be a guideline for people who are developing within the community as to where they should [11]place their developments., and this site is a master plan and is zoned for RM3 use, and so we are not aware sitting here today whether or not there would be any other parcel that would fit the needs, because there is none other than the one that was identified by Mr. Maker that is available for multi-family. To the best of our knowledge this is it.

In addition to that, and this is a separate issue, but I think it is a germane issue, this is not a case where the amount of wet land designated by both the MDEQ and Army Corp is an insignificant portion of the property.

Our client bought this property in 1969 prior to the adoption of the statutes, and then the regulations that were formed thereafter for regulating this land for purposes of wetland regulation and application of the statute in the regulations to the, property would tender the property useless because of the amount of wetland that is on the site. And as you are aware having walked the site, really the old upland area is the drain that was

artificially created and the clay spoils were dug from the drain and dug on the side and that was identified, not certified; and there was some upland on the lower portion which was artificially created through somebody dumping spoils there. We have [12]no idea even when that occurred.

So the upland areas contain spoils as a consequence of the drain, and probably somebody else dumping spoils from a building space. And to say you go to another piece would deny the use of this land, would effectively take the land away from the property owner, and the property would remain vacant.

Maybe that is an objective from a government perspective, but to render the property useless, there is ramifications for that. And certainly it is not prudent and feasible to buy one piece and then go buy another piece of property within the Township. So it is certainly not prudent or feasible within that regard to leave this property vacant and then go buy another parcel.

Certainly to the best of our knowledge, neither the State or Township, nor this department has identified any other available property for that purpose. So even though it is mentioned in their letter, there is no substantive information to support that position, and certainly what better person to testify or to bring information to light on that then the Township and planner who is in charge of planning and development for that particular community.

Mr. DEROCHE: Can I interject here? There is [13]also a narrow strip of upland along Donner Road, and also when we put together our decision document and

looked at alternatives, yes, you provided your testimony from your zoning expert from Chesterfield Township, whatever, and he said that there was one other piece of property zoned for RM3 or whatever it was, but there was not any support as to why that was not sought after.

There is nothing in the documents as to why that piece of property wasn't looked at that might have had a much larger portion of upland on it, and also there was nothing in the record which stated anything about seeking zoning variance with the Township. I would just like to point that out.

MR. STOEPKER : I agree with you, and we did not discuss seeking a zoning variance for the Township in essence to do what you're saying, and what initially the statutes say would be to abandon this property. It was not bought in 1969 to be a park for the surrounding neighborhood. It was not to be a natural resources to be supported by one tax payer for the benefit or the other tax payers. If that is the intent here, someone should step up and say we should buy this property as a natural resource for the general public.

You can look at the other RM3 piece, but that [14]would render this piece vacant. He pays the taxes on this. He had to pay for the special assessment to run the utilities, both sanitary storm and water, and has paid that over the time, plus he paid property taxes on the fair market value of the land.

It may be an alternative, but it is certainly not prudent and feasible, and I don't think anybody in this room would abandon their house and go buy another lot and

let their lot sit vacant and let this accrue taxes and charges against, it and not be able to use it.

In addition to that, Mr. Hernandez testified that available acreage, to the extent it would be available, and we don't know whether it was marketable or not, would cost no less than 43,404 an acre to buy why would someone who bought property in 1969 at a value less than that go out and buy property at 43,000 an acre to develop it when he already owns the land. That is not prudent or feasible either.

So the record is clear, Mr. Maher was not our expert. He was employed by the Township. We called him as an independent witness not knowing what he would say at all. There is no discovery in the MDEQ proceedings. I don't know what he is going to say. He worked for the Township, not for us, so his testimony[15] is independent, I guess is the best way I can put it, so, Bob, that is the best way I can respond to your question.

The next point that -- I think it was raised on page two of the report, and this is just a minor point and maybe it is my venting a little bit about the frustration of this process, but Mr. Carabell through Mr. Leighton filed an amended application to this department and to the State. I think it was 1993, and at that time there was an EPA letter that came out, though not timely from the State's perspective, it was issued objecting to the project as then proposed at that time. It was a 130 unit Township condominium project, 130 units. Within that letter, the EPA stated that if there ever were any restrictions to the plans that were submitted to the State, that those plans would be submitted at least to

the EPA, and theoretically I would assume to this department.

He did not know that until after we tried this case at the State level, that even though we had submitted alternative development plans and analysis, that this department nor the EPA had not been provided that information by the State. We thought we were going on a simultaneous course with the Federal Government and the EPA and Army Corp, so we wouldn't [16] do due process twice, but that is what we're doing.

Unfortunately, the State did not do so. We then conducted a full trial on other permit applications. A Proposed Judgment came out, and a Judgment came out and the State refused to issue the permit, and it was not until after the Judgment was issued that the EPA then objected, but that was only slightly before the permit, so on page two it states that the EPA objected prior to the issuance of the permit, but in actuality, the issuance of the permit was merely perfunctory obligation by the State pursuant to the judge's order. The judge had already decided this case. Unfortunately, this department or the EPA should had been included in a process which would have saved substantial time by all of us here.

But through that process the alternatives that were submitted were twofold. One, the plan that you have in front of you here which is included in your documents which reduce the number of units in a ranch style setting to 106 units with either a wetland enhancement proposal or a natural preservation proposal. The other alternative was a 112 unit townhouse concept that was also examined and submitted as an alternative.

[17]Additionally to that, at the time of the hearing the state submitted a proposal through an expert regarding 24 units along Donner Road, and as Mr. Deroche indicated, there is some upland there, but even that proposal resulted in an encroachment into the wetland area, the lineal distance of Donner Road, and did now answer a number of questions regarding curb cuts and things of that nature. But the development had to be pushed in, because this is a county road and it was understood you only would have one or two curb cuts, so the units would go along Donner and then be pushed in, 24 of them were proposed, and there was a detailed financial analysis done of that by Mr. Seiber and we'll talk about that.

None of those were given to the department of the EPA prior to the time of the Judgement. So we did consider a 24 unit analysis or 24 unit project which would utilize some of the upland, but would have utilized the encroachment to the wetland would have been complete. The small upland area along Donner would have been the front yard set back between, and the driveways and units would have been set back further into the property to the east. I got this upside down. To the east.

The next question I guess is for discussion [18]purposes, and this is more of a legal issue but is factually based, and that goes to page two of the response issued by the department, and that is the statement of a jurisdiction pursuant to Section 404 of the Clean Water Act.

My question is we need to have it identified, because it is not identified within the letter anywhere under

which section or provision that the Federal Government has jurisdiction over this site. I guess we need an answer to that, because you state – you make a conclusionary (sic) statement in your letter that there is jurisdiction pursuant to Section 404 of the Clean Water Act, but you don't tell us under what is the fact that gives you the jurisdiction, and as you have noted, we have objected to jurisdiction here. We objected from day one.

Based upon the recent decisions of the Supreme Court of northern Cook County, there is no doubt in my mind that you don't have jurisdiction. We need to know what your position is on that, because it doesn't tell us in your letter.

MR. GAUTHIER: It is a water of the United States. It is a wetland adjacent to a surface tributary system that is part of the surface by virtue of the fact that it's adjacent to the surface tributary [19]system. It is a water of the United States, and the decision that you have cited pertains to isolated water, and this is not an isolated water.

MR. STOEPKER: Okay. Is it felt – looking at the statute and the rule, it talks about navigable. Clearly this is not adjacent to the Great Lakes or open body of water.

MR. GAUTHIER: It is adjacent to the surface tributary system that eventually flows and involves Lake St. Clair. If it is part of that surface tributary system and it is not isolated by virtue of natural topography, then it is a water of the United States.

MR. STOEPKER: The question I have is can you cite to me where it says natural tributary system in the rules or statutes? I'm aware it says navigable. We were there today and there is nothing navigable here. A sailboat could not move up and navigate this. Does the drain flow north or south based upon the changes? Does it, in fact, flow into Lake St. Clair?

MS. CHUBB: I think it is a separate question that will probably be answered in the appeal decision.

MR. STOEPKER: I guess my question to you, Mr. Gauthier, where does it say tributary?

[20]MS. CHUBB: Tributary to the navigable water, is what you're asking?

MR. STOEPKER: Right.

MS. CHUBB: That is really a question for the division. It is not a question for the district. It may end up that way, but initially this is a division process.

MR. STOEPKER: So just to be clear, the department is not relying on this migratory bird rule?

MR. GAUTHIER: No.

MR. STOEPKER: Okay. I'm looking at a section of the regulations where it talks about interstate wetlands. All other water such as interstate lakes, rivers, streams, including intermittent streams, wetlands mud flats, sand flats, then which could effect interstate or foreign commerce, including such waters which are or could be used by interstate or foreign

travelers for interstate or other purposes from which fishing or shellfish could or would be taken from interstate commerce.

Does anybody find any shellfish within the Oemig Drain? Are any fish at all in the interstate commerce, is that the position you're taking? The next qualification – I mean is that the answer yes or no? I need to know.

[21]MS. CHUBB: This is not an inquisition here. It is more of your presentation. Their record stands alone as it currently is. Whatever is in here is their position. That is the best they can do at this time.

MR. STOEPKER: Okay. Then if we turn to the report, it talks about the lack of an alternative, a feasible analysis, page two at the bottom. And I quote, "they object to issuance of a federal permit, this is being the EPA, unless the applicant provides an adequate alternative analysis." That is one portion. "Demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable and provides an acceptable mitigation plan to construct in-kind wetland mitigation at a minimum ratio of one to five."

And I'm not sure again what the objection is, but we can divide this up in two points really. Mr. Seiber testified extensively at the trial and did the basic research, and what I would like him to do is go through with you right now what we did from a prudent feasibility standpoint. I dare say the State of Michigan, and I'll venture to say that you have never had the engineering analysis and mathematical and market analysis that was done in reference to this particular

project here that we did in this case.

[22]We had initialiy hired Premises and Associates which did an analysis. They are a division of SHT, a large architectural firm within the industry who concluded there was no practicable feasible alternative. I think we hired Mr. Sieber, who is a well known engineer whose qualifications are mentioned in the record, and Clif, if you could go through, first of all, your background and explain that and go through the analysis that you went through.

MR. SIEBERT: All right. I'm a registered engineer in Michigan, principal of the firm Sieber, Keast and Associates, and the primary function of our firm is to develop engineering design plans for new development such as condominiums, single family residential sites, shopping centers, industrial parks, pretty much any type of development.

What I did with the approach to this project was to develop eight different types or eight different scenarios and assign project costs to those different scenarios. I could briefly summarize those eight scenarios.

The first one provided for the 112 units shown on the plan that is on the table here, and this scenario included mitigation offsite to compensate for the wetland fill on this project. Upon preparing a [23]design of the utilities of the site and assigning unit prices from contractor bidding, I concluded that on this first scenario there was a loss per – overall loss of 2.26 percent when the offsite mitigation is included.

A second scenario was also prepared which provided for on site enhancement of the 112 townhouse units, and under that condition a profit of 4.79 percent was obtained.

Then there were two other scenarios, one for the 106 unit ranch home type product, and when including an offsite mitigation for to compensate for the on site fill, we ended up with a loss of around 2.17 percent.

Then under the 106 unit ranch type homes, an alternative, which included on site enhancement was investigated, and we had approximately 5.13 percent profit.

Next we looked at the 24 unit scenario which included a condominium located along Donner Road, and in that case the same procedure was followed, where a design of the utilities was prepared and then unit prices obtained from contractors were plugged into those total quantities, and we obtained a cost for the overall project under that condition with the 24 unit [24]townhouse project with offsite mitigation resulted in a loss of 16.24 percent on the overall project. That is a percentage of the total of the project costs.

The next analysis was the 24 unit townhouse project with on site enhancement. Under the condition there was a loss of 7.17 percent.

Next there was a 24 unit offsite mitigation scenario utilized the ranch homes. Under that condition there was a 13.8 percent loss.

And then finally under again with the 24 units utilizing

on site enhancements with the ranch type units with a loss of 5.58 percent.

Clearly with the 24 unit condition of condominium homes located adjacent to Donner Road, all those resulted to the net loss to the project site was not a reasonable and prudent alternative for that type of development.

MR. STOEPKER: From a pricing standpoint, what we did do so we were pretty clear on that, the acreage price per unit was established through Mr. Hernandez, through ReMax. He did a market analysis of what open acreage would be purchased for in the Macomb County area, and I think it ranged from 36 to 37 to 43,000, in that area, and he subscribed also based upon his knowledge of it, a unit, retail selling price of a [25]unit, so you could show the differential and, you know, gross income valuation of the real estate, and then what Mr. Seiber included within his analysis is all the infrastructure cost and then the building unit cost per unit which was established. So the analysis included cost of acreage, retail sale price of the unit, all the infrastructure improvements and the per unit building costs for either a townhouse or ranch unit.

Then obviously included with that, depending on what the scenario was, if you could get land for offsite mitigation. The problem that you have with this particular site is that due to the degree of the wetland, if you apply their one to one half ratio sitting here today, I don't know where anybody comes up with that number. It is not in any statute that we seen, but that seems to be a number that is drawn out of the air and thrown at us both and consistent. The state and Army

Corp both suggested that. It makes it impossible. You have to go out and buy 30 or 20.

MR. SIEBER: I think it was around 19 acres.

MR. STOEPKER: To develop 15.

MR. LEIGHTON: It doesn't work that way. You end up buying a lot more land.

MR. STOEPKER: So if this was the case where a determination had been made, maybe 20 percent or 10 [26]percent or 15 or something, your scenario might be different in a typical recommendation, one and a half might be feasible, but under this scenario it doesn't work.

Now, the state had an expert testify who raised this 24 unit issue. There are two issues with that. One, he would not identify the property cost. His equations did not include the value of real estate. I don't know why.

And then second, when we asked him where he got his numbers, from, he invoked attorney/client privilege, which I thought was kind of strange. He was their expert, but he happened to be a lawyer and he said he got this information from somebody but he wouldn't divulge. But the most clear thing that was absent, he did not include the value of real estate, which you have to include, especially if you're going to do an offsite mitigation as to the acreage available.

He really never disputed, to the best of my knowledge, the cost that Clif submitted as an engineer, and Clif's firm has done numerous developments and we

submitted the curriculum vitae to the state.

MS. CHUBB: What year, what was the date that you did those estimates, and how relevant would they [27]have carried over to the state process, to the federal?

MR. SEIBER: The estimates are dated January 12th, '98.

MS. CHUBB: And how long do they stay current?

MR. SEIBER: Well, there has been some increase since that time. You know, that is about a three year period. There has been some increase in contractor prices since then as well as I suppose an increase in housing, sale price, too, which may kind of offset that.

MR. STOEPKER: The issues Mr. Hernandez testified to is there is limited multi-family that is available, so, therefore, the price is set based upon the market. Part of that has to do with is that communities do not zone much of their property multi-family, they preferred single ranch style. This piece was multi-family, because it is all the apartments you saw as you drove down Donner, and because of its adjacent to the Selfridge Base. We try to make it more of the single family type looking concept by the ranch, which would be based upon what the Township had suggested for senior using. We knew we got less units that way, but since their emphasis [28]was for more senior housing, but availability for empty nesters and things of that nature, we said we'd look at that, and that actually reduces the number of units by six – not only six from the 112, but down from the original 130 that was proposed. I'm

trying to think about back in '87 if there were 170 apartment units that were proposed for that site. I don't think that was reviewed by this department, but just by the state.

MR. DEROCHE: Can I just say that the EPA, as administrator for the 404 program is I believe where that 1.45 mitigation ratio came from, mitigation guidelines, I believe. Is that right, Wally, it is maybe not in their guidelines, but –

MR. GAUTHIER: Certainly.

MR. DEROCHE: Certainly I know that the EPA in their letter recommended a ratio for 1.5.

MR. STOEPKER: It is a fictitious number, and everybody seemed to follow that number. But in looking at this, and this dovetails into what Bob's expertise is, we looked at that, and, you know, sometimes maybe being a mitigation parcel and creating a wetland does make sense, but there are other ways of mitigating, and that was recognized n this instance, and what we tried to do was take a piece when you go through the financial analysis and say it is fair to this property [29]owner who has owned this since '69 to abandon this and go out and buy another parcel for development purposes, and the answer to that was no what we determined.

When you're faced with that and looking at all the other alternatives, we didn't rush this through. We filed this application in '93 and our trail was in '98. We made every effort to try to come up with a solution that made sense. It was our initiative to reduce the number of

issues and come up with a concept of mitigation that we thought met the spirit and intent of purpose of the federal and state laws and regulations adopted under that.

That goes in to why we suggested both the preservation plan and the alternative for the Township or the ranch style units which would have been a cheaper plan. We threw those both out there, because to leave alone what is not there and not touch is certainly less expensive than to create something that doesn't exist. We recommended at the hearing that was more cost from Mr. Carabell's standpoint was this enhancement plan. So that goes to the next portion of that letter.

MR. CARABELL: Can I why ask a question there? I don't understand all this that is on the record regarding this mitigation issue. Has the [30]Federal Government decided or its agency decided that that has no merit, is that what the conclusion is?

MS. CHUBB: Does what have no merit?

MR. CARABELL: That mitigation was not prudent or feasible and it was testified to, matter of record and ruled upon. Does that have no merit to you people who are now reviewing this information?

MS. CHUBB: My current understanding is that that was a state process and it does not have any binding effect on the federal review of the project.

MR. STOEPKER: I think and we could – that is a legal issue. I think what Bob is saying, it was his

understanding that there is some edict some place that says one to one and a half, and to date we have never found that either at the federal or state level. I don't know where that number comes from.

We have even seen it one to two and it changes, and when looking at both statutes, the state and federal statute is we knew that, you know, this process entailed both reviews. We looked at and said what can we do with this site that will make it environmentally better than it is now and meet the objectives of the statute while allowing this developer to build on the site, and that is where Bob came in and came up with two concepts.

[31]One which was more expensive but which is what we're recommending for purposes of this permit, and so in looking at the last question or statement here demonstrating that the wetland impacts have been avoided and minimized to the maximum extent predictable and provided a maximum mitigation plan. I admit I ignored the one and a half, because I don't think that is relevant here. I think Bob why don't you go through your analysis of the property and why you have recommended what you are recommending.

MR. LEIGHTON: By the way, the State Highway Department is one for on, and I have never understood that their mitigation ratio is always one for one. This property is somewhat isolated, the wetland is somewhat isolated. It is surrounded on one side by a retention base and it is quite deep on the north side. I think the water on the retention base is four to six feet below the surface of the ground. The drain that runs along the hypotenuse of this angle takes water from

upstream water headed by the property. It is independent of the property. There is a berm that runs along the edge of the drain and holds the water in the drain and holds the water on the site. There is very little communication between the drain and wetland on the property. The drain is lower than the site.

[32]By the same token, the drain that runs along Donner Road again isolates this wetland from any outside watershed. So really all we have here is a fairly monotypic culture, mostly Cottonwood. There is some Elm and Silver Maple in there, with very little ground vegetation.

We brought photographs along so you can see how bare the ground surface is. That is primarily because you do get some standing water in there for a period of time and it dries up, and plants would survive that change. So it is bare ground for the most part. The only rain or hydrology it gets is precipitation, and it is really limited to that, so it is not handling large volumes of water and it is – it lacks, diversity. There is not a whole lot of cover, at least on the ground plane, there might be some cover in the other areas possibly for birds, but the ground plane is pretty open and it is not a place where wildlife is good going to feel comfortable in terms of having shelter. There is not a huge food supply for most inhabitants, and again it is just not very diverse.

MR. STOEPKER: I just want to interject. The vast majority of the understudy is in the upland and that was recognized even by the state consultant in [33]their reviews.

MR. LEIGHTON: That is still expressly limited even

along the dike, there is Box Elder and Grapevine, and I think there is some Wild Rose, but it is really not, you know, it is a choked-out kind of area that gets cut every so often by the Detroit Edison because of the power line easement that runs through there the drain is subject to being cleaned out, because the drain commissioner has a good reputation of doing that up in Macomb County. That is subject to change over time. It depends on what agency comes in and does their thing.

As a result, we have a wetland that if you were to add up all the functional aspects, I think is pretty low on the scale. So the reason we proposed enhancement – by the way, I don't have any problem with leaving it as a forest as well. It would be a significant piece of the site if it were just left. I really don't have a problem with that. I think the advantage of the enhancement is that – by the way, I noticed in the review it was stated that storm water is discharged into the enhancement area. That is not true. The storm water is discharged to the drain. The enhancement is separate in the enhancement system on the site. The intent for that is to begin to deal [34]with offsite water, water that is coming in from the upstream watershed. The enhancement would be excavated down to the ditch elevation with existing trees. You can save the better trees and maybe take out some of the smaller ones.

When you do the enhancement you would introduce some water, some different diversity into the site and increase flood storage, if that is, in fact, a problem. It was brought up in the review as being a problem, but this would be a very large increase in the storage capacity in the flood system, and it would do a lot of

filter water, because as you know the first flush is really the concern, that first surge of water that comes down through, and this would provide an area for that first flush to go into and be stored and filtered out. And then later on as the cleaner water comes down, it would just go through as it normally does.

So there seems to be in other minds some benefits to taking some of the Cottonwoods down. They aren't good for firewood. They are pretty useless as far as a fire goes. They certainly don't have any lumber value. If you burn it in your fireplace the chimney would get plugged up with creosol. Cotton was generally known as a nuisance plant. Taking some of [35]those down and reintroducing some higher quality vegetation in my mind would be a big improvement in that forested area.

MS. CHUBB: Is that based on strictly looking at that site or are you looking at what else is available in the county or in the township or in terms of wetland resource base, the percentages emergent, things in the emergent category?

MR. LEIGHTON: I have never done an inventory of the county, but I look at a lot of property, thousands of acres. We do an average of about 300 development projects a year, so I'm out there looking at the properties that are really of interest, and you'll find in the lake bottom counties there isn't a lot of diversity. There is a lot of this kind of wetland, this forested wetland, there is a lot of it.

I know it is contrary to what is being said in here, but the truth is if you go over these counties in an airplane you don't see much open land, it is mostly forested.

There are agricultural fields, but agriculture stopped a long time ago in this area. Some of them are very young trees. You have real heavy clay. When they were farming it, they had ag tile put in the ground and then it plugs up and they stop farming. With the clay soil most of it automatically [36]reverts into a forest type environment.

Most of the property I look at there are hardly any sites put there without wetlands. The Cottonwood certainly is out there a lot. If you get into something as pin oaks (phonetic), some of the higher quality vegetation, it is few and far between. You have to go out into the areas that are left over from the glaciers. It is mostly Cottonwood and Elm and Silver Maple. It is not an unusual site I don't think. I think there is a lot more out there than this report indicates. You have to get in an airplane to see it.

MS. CHUBB: Although you don't necessarily know from an airplane if you're looking at forested wetland or upland.

MR. LEIGHTON: The amount of acres I have seen of upland forested in Macomb County is small that is the function of the soil type, the drainage. You're not going to get those kind of trees because they have to have good drainage.

See, when the lake came in after the glacier and the lake receded, there are a number of times when it came back into the land and receded again. Every time it did that it would build sand dunes. Once in awhile you would catch a ridge out in some of these [37]sites where there is some sand, maybe three or four feet deep and

you'll hit the clay. On that ridge you'll see some maybe Black Ash or Cherry. Sometimes you will see it mixed in with the wetland forested complexes.

The percentage of upland is a lot lower than the wetland to the point of it – a lot of times it is difficult to build on these woods, because the uplands area are so sparse. You would be so fragmented that economically you wouldn't be able to fill it. This is not a unique site I think in my mind, and that is kind of the rationale for the enhancement.

If you want to save the trees, I don't think that is a big problem either. If you do perceive flooding problems and short of the offsite water quality concerns, the enhancement would do a lot to begin to take care of that. The existing forested wetlands is not filtering any offsite water, an dif it did, there is no ground plant vegetation anyway. My lawn area would filter more area than that if you did have water running across there. You would have all kinds of silt in the drainage system.

MS. CHUBB: Is there a ditch on the north property line?

MR. STOEPKER: There is a retention pond.

[38]MR. LEIGHTON: There is a fairly large retention pond.

MR. STOEPKER: There is that last development of multi-family units north of this site.

MR. LEIGHTON: I was curious today, this big federal

housing project has no retention pond.

MR. DEROCHE: There isn't one. We just saw the one edge of it.

MR. STOEPKER: On page three of the report, and this was something I think that was touched upon in the field a little bit, and that had to do with the issues raised by the department regarding Indiana bats. On potentiality, or the based upon the habitat on the site, and we had responded back to the department in the position that we have taken and continued to take, is this site has been the subject of analysis by either the State of Michigan Department of Environmental Quality or by the EPA and the Army Corp jointly since 1987, and in reference to this particular project, since 1993 when the first proposal came in, this proposal came in for the 130 unit, the EPA issued a letter as did Fish and Wildlife, and then the Fish and Wildlife issued a second letter during that process stating equivocally there is no endangered or rare species on the property.

[39]More recently, in the response to the analysis done by the Army Corp they restated that position, and to the best of my knowledge there has been no sighting of any Indiana bats. It has been stated that no mesh netting has gone up to discover that, but to me, based upon the almost – let's see if my math is right, 12 or 14 years that this site has been looked at, it certainly in my mind is conceivable that somebody would have sighted this within the departments and said there is, this out there. There is Indiana bats out there.

To ask someone to prove a negative to me is a very difficult thing to do. It is not our burden to do so. What

we're relying upon is the findings made by the Federal Government that there is no endangered species on the property.

MS. CHUBB: I know I mentioned that this morning at the site visit that I don't believe my reading of the decision document that didn't come up in district as a controlling factor or denial.

MR. STOEPKER: We may have to talk about that. We're not sure in going through that. That is the last page, I think, is what you're talking about. The one with the – page 25, the chart. That is kind of a summary chart.

[40]MS. CHUBB: No, no, I didn't get that from that.

MR. LEIGHTON: At the conclusion part you mean.

MS. CHUBB: This introductory part is simply a summary of the comments that they received on public notice. They are restating different positions of other agencies and things.

MR. STOEPKER: We're trying to address the substantive issues raised in the report through this by saying yes, did you pick this and the nature of the habitat.

So at any rate, I mean the response I guess we have given back to that. On page six, Bob, there was the discussion regarding loss of habitat on this property and your analysis of the site. Could you describe the basic habitat.

MR. LEIGHTON: Again it is limited because of the lack of diversity. There is habitat there, but again if you were to add it up, I don't think it would score very high. If it very limited in diversity. Whatever scale you want to use. Cottonwood is Cottonwood. If you value Cottonwood and you think the big woods of Cottonwood is environmentally a powerful resource, I guess I wouldn't argue with you. I find [41]Cottonwood to be more of a nuisance than a value.

MR. STOEPKER: The other comment I would make is in reference to there is mention of the migratory birds traveling through the area, but there is certainly no indication that there is a lack of habitat for migratory birds within the area at all.

So the loss of these trees to the extent, by the way, which are not regulated by any statute, I mean Mr. Carabell can come tomorrow and can cut down every tree that is there. Why we're even dealing with that, if that is the habitat we're talking about, first of all, it is not regulated.

Second, to the extent it could be regulated, there is nothing demonstrating that I have seen that to the loss of these trees, to the extent there would be a loss, results in a loss of migratory birds.

You know, I'm not an expert on this, but I live in an old developed suburban community that is heavily treed, not much different than actually this property is, and there is no loss of migratory birds within that treed area that might be scientific but nor is the statement within the report that to the extent that is the habitat they're talking about that the loss of that will somehow

jeopardize migrating birds since we don't have any significant standing water except [42]maybe at a limited time of the year.

This is not a site that has been demonstrated to support any type of waterfall at all. So if that is the habitat that is being discussed, that is not regulated and it is certainly not indicated to be something that would be detrimental to migratory birds where there is a lack of habitat within the area to migratory birds.

One of the other issue that was sited in the letter was the objection from the local community in reference to that there was a letter that was sent by the local prosecutor. I might tell you that we responded to that letter with a letter dated April 5th, 2000, provided a great deal of information to that prosecutor, asking him to meet with us, and he never took us up on that invitation. I don't know why. Am I aware that he hired anybody to do any study for him. Mr. Gun (phonetic) whose names was not mentioned in here. He responded to the last public notice I think that was sent. He doesn't represent any kind of conservation group, none of the organization groups, environmental groups, none of the local communities other than the prosecutor objected to the development on this site.

In fact, if you read the transcript where Mr. Gun testified at the hearing, he thought – he agreed [43]that this was a very marginal wetland and that something should be done to enhance the wetland which is, in fact, what we did so, yes, Mr. Gun did say no, but Mr. Gun represents Mr. Gun and nobody beyond Mr. Gun, and all the recognized conservation groups which are copied on that never responded, and there was no objection

from the Macomb County Drain Commission or Chesterfield Township or Macomb County except through the prosecutor's knowledge of this project was nothing and didn't want to be informed frankly.

MR. LEIGHTON: Mr. Gun was objecting to the fact that we are going to affect the recharge of the ground water.

MR. STOEPKER: That is not even applicable here. So his complaints to that extent shows he doesn't even understand the type of land that we're dealing with. There is minimal or no local objection. Clearly there was none from Chesterfield or from the Drain Commission or Macomb County rain Commission who was in charge of issues relating to soil erosion or flood control within the community. And obviously the state has already given their answer on this issue.

I think, Bob, you talked about on page four of the report there was the issue of, I think it was raised, and this may be in response to Mr. Gunk's [44]comments regarding the filtering purpose of this wetland.

MR. LEIGHTON: Well, it is not receiving any water from outside, so, yes, I guess the rain water or the precipitation would sit there. I don't know, there is a lot of sediments in rain water typically. It might be some acid in the rain water. The way it is set up there is no water passing through it so it doesn't filter anything other than precipitation, if it filters even that.

MR. STOEPKER: There was a complaint made about recharging the ground water.

MR. GAUTHIER: We had to fairly summarize the issue of –

MR. LEIGHTON: We have built a couple golf courses where we tried to go down and put wells into irrigation and there was no groundwater. We could not find well capacity down there. A lot of these areas out here is clay forever and you don't hit aqua. This clay is so impervious that it would take 60 years for the water to get to the groundwater table. It just doesn't happen here.

MR. STOEPKER: Obviously the comments regarding culture characteristics speak to themselves. Nor were there any historic issues that was an issue [45]that was potentially rated by the state department. They sent correspondence in to the department saying there was nothing there.

One of the other issues that was raised had to do with the loss of pollution characteristics or control of the wetland that is there, and potentially looking at what was being proposed, and, Bob, I don't know if you could comment on that.

MR. LEIGHTON: This storm water system is not detailed out to the point it would be in final state plan approval. In fact, back then I think retention ponds were probably less sophisticated than they are now. The only real impervious surface you have to worry about is this paved surface. The rooftop water is clean. You could take that and let it run across the open space and wherever, because that is relatively clean water. What we do with the paved surface, which is minimal by the site. This is a few driveways and a small

collector drive that goes out to an entrance. That is broken down into fairly small water sheds typically which puts a grease and oil trap in the bottom of the catch basin. I have seen studies where they claim that takes nearly 90 percent of the impurities out of the water. It then goes – this would be designed a little bit different now because we [46]have gotten more sophisticated. What would happen, rather than going into one individual basin, which is diagramed on here, it is likely we would be required to discharge into what is called a first flush basin. It is a small capacity holding pond that has the first amount of water and attempts to take out whatever impurities are there that the catch basin doesn't pick up. From there it would overflow into actually a retention pond, would have some slope to it, and during normal flows would be sort of a very circuitous pattern that would be full of vegetation. The bottom line would be from the inlet structure to the outlet structure. The attempt would be to make the water travel a great distance and a lot of vegetation before it is discharged out into the drain.

As I said in this case, we are taking that filtered water then out to the drain. A lot of times what we'll attempt to do is actually take this roof water and not introduce it into this drainage system. This has a better opportunity to deal with the water that has some pollutants in it, and we're not wasting the storage capacity and clean water.

More recently we have been trying to take our roof water directly over to a mitigation basin or even discharge it to the drain after it goes to a small [47]basin to slow the velocity down. So this looks pretty simple here. This system would be pretty

sophisticated, at least in terms of what we know today. The pollutants, I would venture to say, would not be a measurable issue in this whole watershed or the Great Lakes System. I don't think it would even measure on the scale.

MR. GAUTHIER: One thing, something that has troubled me, what is actually going on in the areas between your buildings and this? Is this fill?

MR. LEIGHTON: It would be a preservation area. That would all be treed.

MR. GAUTHIER: This is not a building or asphalt, it's forest.

MR. STOEPKER: They actually have a woodland ordinance in Chesterfield. There is a penalty or a fine or whatever that has to be paid. There is a woodland preservation ordinance within the Township that would be applied to the development, so to the extent that we can, we would.

I mean we would, because there is a financial penalty to the removal of trees. To the extent you remove the trees there is a replacement requirement. There is a DBH formula.

MR. LEIGHTON: Everybody is different.

[48]MR. STOEPKER: Which Maher alluded to, there is a DBH you take out. There is usually an excess for the DBH that you removed that you have to replace.

MR. LEIGHTON: The disturbed area would end up

being reforested. I know it would take a few years, but over time this area again would come back as a canopy.

MR. STOEPKER: That is why we had given the other alternative. If they said we would prefer to just leave the tree canopy the way it is, don't touch that and don't touch this here, okay, fine. But in our discussions with them it seemed like the enhancement concept, because it retained some tree canopy, but also created diversity which the site lacked. It just seemed the more prudent site and a prudent alternative, and also from connection into the drain, it seemed like it was an improvement over just the preservation element. It goes beyond what your question was, but there is a treed ordinance that says we have to preserve as many trees as you can.

MR. GAUTHIER: You would none the less be re-grading the entire site.

MR. LEIGHTON: The grading limits would be basically behind the building. This could be graded or not depending on how the agency feels.

[49]MR. GAUTHIER: Did we ever get an acreage figured for the building ordinance?

MR. LEIGHTON: We did a quick calculation and it looked like the 3.74 was the whole open area. But visually that doesn't look accurate, but we figured out that the property line goes from the center of the road.

MS. CHUBB: So you're going to be grading out to the property line here, but then you have to replant trees in this area.

MR. SEIBER: Because the silt fence is here, it doesn't necessarily mean that trees within that area would be coming down. They would be selectively saved as the grading allows, but the siltation fence following the property line.

MR. LEIGHTON: I have developers that actually extend foundation down to get back to grade. You do very little grading around the exterior of the building. You sort of vary the foundation to fit the land. You can save trees pretty close to the units if you do that. Then if you use –

MR. SEIBER: Down here I think we tried to hold ten feet off the building.

MR. LEIGHTON: Yes, you have to get back down to the scaffolding.

[50]MS. CHUBB: Was the district aware that the applicant was agreeable to leaving instead of doing enhancement? It seemed like in the report you focused on either the enhancement or something else. I didn't see the other option.

MR. DEROCHE: I did not know that was an option they were considering, because of the state process that had already been gone through.

MR. STOEPKER: What we did is we said here, these are two alternatives. We will do either one of these what you deemed to be best, and they concluded enhancement was best and we –

MS. CHUBB: They?

MR. STOEPKER: Being the state. Right through the administrative law judge, and I feel that in our preliminary discussions they thought enhancement was best, but they were thinking in minds of mitigation ratios, like traditional mitigation ratios.

Judge Patterson I think concluded that it was best. We're not wedded to either scenario and that is why we threw them out. Either preserve it the way it is, and the plan does say preservation, which means preserve, don't touch, and then to verify that, certainly we would put that in a [51]conservation easement, which we proposed anyway, that it would go in a conservation easement which would prevent that from ever being built upon, and then a conservation easement in the form of preservation.

MS. CHUBB: Is that an option at this point given what the state ruling, the judge's ruling was for the enhancement? Aren't you tied to that now?

MR. STOEPKER: I think that if this department were to say that it preferred preservation, that is why I hate this whole thing. Everybody should sit down and go through this whole procedure at once. My feeling is, I can't speak for the department, but I would think that if this department felt that preservation was the better route to go, I don't see them disputing that concept. Bob, do you?

MR. LEIGHTON: I doubt it.

MR. STOEPKER: And we didn't care, we were just trying to be proper in our thinking and that is why we gave two alternatives. And I can see why, Bob, you

thought with the one because that was what approved.

MR. DEROCHE: What was given to us?

MR. STOEPKER: We presented to the state though in that trial both alternatives. We advocated both and tried to point out the benefits of the two, so we advocated both to them and said you decide. One [52]being more costly and we knew that.

MS. CHUBB: I had some questions specifically on the issue you raised in the request for appeal that I wanted to get through.

MR. STOEPKER: Just go ahead.
MS. CHUBB: I don't know if –

MR. STOEPKER: There was some constructional and operation impact issues, water runoff storage points that were raised. Again these were marginal things, but we wanted to address them to make sure.

We oversized certain things on purpose because of those potential issues and we just wanted to clarify that. Why don't you go ahead and ask you questions and maybe it is covered.

MS. CHUBB: Okay. Well, I just want to understand how you have worded these appeal reasons so I can make an accurate recommendation to the General.

On the first one which deals with the jurisdiction over the land. We have no jurisdiction over the land is what you stated here. Is that pertaining strictly to the wetlands or also the ditch or you're not thinking about

the ditch because there is no work in that area or how?

MR. STOEPKER: I -

MS. CHUBB: How far are you taking that [53]statement?

MR. STOEPKER: My position is if I look at the statute and the rules, the Federal Government doesn't have jurisdiction over this site because it is not - it is an isolated parcel. It is not next to a navigable stream. It is not adjacent, which is part of Interstate Commerce when you go through the regulations, and if you were to include the stream, which we are not doing, is not within our jurisdiction. We don't know. I mean if the county came to us and said clean up the drain, I guess we would have to clean up the drain, but our intention is we would stay out of drain.

MS. CHUBB: Do you consider the drain a water of the U.S.?

MR. STOEPKER: No, I don't think it is a water of the United States, not within the definition of the statute. I don't think so at all.

MS. CHUBB: Nor the wetland being regulated because it is isolated. That is the major issue.

MR. STOEPKER: Yes, that is why I asked about the migratory bird rule. If you look at the regulations of the wetland, which falls within the statute, I don't see the corollary. I don't see where it is. That is when Mr. Cauthier used the term tributary. That is a [54]new one to me. You are always learning.

Our position is no where under the statute or rules can you find an access that falls under the jurisdiction even if you include the drain.

MS. CHUBB: Because of the berm?

MR. STOEPKER: Even if you include the drain, the drain was – first of all, it was not created by the United States. It was created to drain land in Macomb County for flood control. It is under the jurisdiction of the County Drain Commission.

The is other issue, this is not even a flood plane.

MR. LEIGHTON: The drain commissioner can come in here and clean that out any time he wants to.

MS. CHUBB: When that drain was created what was the character of that land? Was it all wetland at one time.

MR. LEIGHTON: If you believe scientific theory, this was all under the Great Lakes at one time.

MS. CHUBB: I wasn't going to go back that far.

MR. LEIGHTON: If you believe scientific theory.

MS. CHUBB: Before the houses got there, before the drain was put in, what was there? Was it [55]wetland?

MR. LEIGHTON: It is that. Most of Southeastern Michigan was wetland, but I don't have any photographs or survey that verify that. I mean that is what the scientific theory is. I think I tend to believe

that. What normal wetland, my guess is it was probably more emergent at that time. You have to figure that drain dropped the water table three, four feet, so it has been a long slow drying out process, and I'm not so sure that that process isn't continuing today, because the lake levels are down five feet. Whether that will reverse itself and go the other way. You have people saying that is not normal. What is normal? In what context are you going to put this thing.

What happens if those lakes drop another two feet. I mean there is lots coming up on the thumb area. There is a judge up there that owns a big piece of land. He just picked up six lots that used to be wetland, because the lake level is down five feet, so what was wetland is no longer wetland.

MR. STOEPKER: Going back to your question, I'm going to take the definition out of the CFR. This is what is called interstate water. The term water of the United States, because that goes back to the [56]question of who has jurisdiction of the drain. The term waters of the United States means all waters which are currently used or were used in the past or may be susceptible to use in interstate or foreign commerce.

MS. CHUBB: Isn't that navigable water?

MR. STOEPKER: No, the term waters of the United States.

MR. STOEPKER: Then you get into. Then if you look at.

MR. DEROCHE: CFR328.3A3, waters of the United States is defined as quote, "waters such as intrastate lakes, rivers, streams, including intermittent streams, mudflat, sandflats, wetlands, sloughs, prairies, potholes, wet meadows, playa lakes or natural ponds, the use, the degradation or destruction of which could affect interstate or foreign commerce including any such water.

MR. GAUTHIER: And that is part C?

MR. STOEPKER: Yes.

MR. STOEPKER: But I focused in on the wetland section of the wetland as opposed to ponds. That case dealt with a pond. If you apply that definition of waters, it says all interstate waters including interstate wetlands, and then it kind of uses that same definition. All other waters such as [57]intrastate lakes, rivers, streams, including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairies, potholes, wet meadows, playa, P-L-A-Y-A lakes, or natural ponds. The use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters.

And then they go into these other ones which I started reading, could be used by interstate or foreign travelers for recreational or other purposes or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce or which could be used for industrial purposes by industries, otherwise defined as waters of the United States.

And then it talks about tributaries identified in

paragraphs S1 through 4, and then you get into the territorial. I mean I read that and it is not there. So at any rate –

MS. CHUBB: Then, issue number two, where you talk about the res judicata issue which is – as I understand this, even though the state decision specified that it was strictly under the state law, this latin term or whatever it is.

MR. STOEPKER: Res judicata?

MS. CHUBB: Right.

[58]MR. STOEPKER: I was never good at the Latin terms either.

MS. CHUBB: Explain what this issue is?

MR. STOEPKER: It is a legal issue as opposed to a factual analysis that this would have gone through. As you.are aware, and everybody can correct me if I'm wrong, there are two statutes within the United States pursuant to the compact within the Federal Government and the sate. administer, both the state and- federal statutes and regulations pertain to the regulations of wetlands, Michigan and New Jersey, am I correct so far?

MR. GAUTHIER: Yes.

MR. STOEPKER: In that process if one reads the compact, and I think it is actually is called a compact between the State and Federal Government, they arecharged to do so, so they are acting on behalf of the

Federal Government and the State, and the purpose of that was to allow a uniform system in applying for a permit, so one wouldn't have to go through what we're going through here.

In other states I'm assuming you would go through the federal procedure and you wouldn't have to deal with different agencies, but nevertheless the intent here was to take it through one, and the permit [59] process in this case requires that by law that the permit application be copied to and forwarded to the EPA as an agency, administrative agency on behalf of the Federal Government.

So it is my position that once that process has occurred and you now have a trial on the issue and these are the exact same issues, the issues that are raised here are not different than are raised at the state process. Res judicata means it is done, you can't litigate or decide the issues again once it has been determined.

One would say since the Army Corp, the Federal Government was not at that table they are not bound by that decision because they are not a party to that case specifically.

My position is they were through this compact, because the state is acting on behalf of the Federal Government in administering these statutes and regulations, but that is not something Mr. Gauthier or Mr. Deroche would have gone through in their analysis. It is a legal position.

MS. CHUBB: I just wanted to make sure. Then our office Counsel can read the transcript and respond

more so than I would.

MR. STOEPKER: That is the position.

[60]MS. CHUBB: Okay. Number three, that is kind of what we have been going through, which it is a substantive issue of the review.

MS. CHUBB: Point by point disagreeing things that were stated.

MR. STOEPKER: It is the substantive review of the wetland analysis.

MR. STOEPKER: Did you have anymore questions on that?

MS. CHUBB: No. I just wanted to make sure that I understood what your appeal issues were.

MR. STOEPKER: We'll try to move this along. One of the comments that were raised on page six was the impact of the lake on the drain. And I guess I didn't understand that comment, but whether or not somehow Lake St. Clair impacts that drain and –

MR. DEROCHE: What we were saying was that, and what I was saying I should say in my document here was the when something – the Corp of Engineers jurisdiction or section ten, water goes to the furthest extent of the impact of the ordinary high water mark of the lake.

It is my belief that elevation, that ordinary high water mark elevation goes upstream to a certain point, and

that I believe that influence is still at [61]this location, that this elevation is likely – the elevation of Sutherland-Oemig Drain, which is this wetland is adjacent to, is within the influence. So I was making a point for adjacency to a section ten water.

MR. STOEPKER: Was it documented? What is the lineal distance from the lake to the site by drain.

MR. DEROCHE: I don't know what it is.

MR. STOEPKER: Is it miles?

MR. DEROCHE: I'm not sure.

MS. CHUBB: He is using a water elevation.

MR. STOEPKER: He used an analysis in the report of the Salt River which is a mile away from Lake St. Clair.

MR. DEROCHE: Salt River is a mile away from this site or a little over a mile away from this site, and although that is a bigger river, we take jurisdiction up to 23 Mile Road as far as the influence of Lake St. Clair.

MR. STOEPKER: On the Salt River?

MR. DEROCHE: On the Salt River.

MR. GAUTHEIR: If you imagine Lake St. Clair at a lake stage or a level and that is equivalent to it is ordinary high water mark it is established contour that spreads across the landscape wherever it may go. [62]All the tributaries of Lake St. Clair have within their reach that elevation contour along its banks for

some distance, because it is such a flat landscape so it may be based upon contour lines where the high water mark may stepped very close, if not adjacent to that area.

MR. STOEPKER: You haven't looked at any of the objective data which shows that?

MR. DEROCHE: No, sir.

MR. STOEPKER: So it is just a guess on your part?

MR. DEROCHE: Right.

MR. STOEPKER: And the concern would be then the water runoff that goes into Lake St. Clair effects lake elevations, lake clarity.

MR. DEROCHE: Yes, all of those things.

MR. STOEPKER: That fits into what we were going to talk about next. What about lake elevation, the concern would be water runoff from the site which would result for a potential fluctuation of water level in addition to water clarity.

MR. DEROCHE: More so and the drainage system that leads down to the lake proper, if you will. Realizing this site is only 20 acres, that it has a potential to store precipitation in large storm events and hold the precipitation rather than having it being [63]released to that tributary system that eventually goes to the big body of water, Lake St. Clair.

So the impacts that we're talking about are again on not

that 20 acres, but as they impact that tributary system and down to the lake, whether it is added sediment, pollutant, added water volume.

MR. STOEPKER: Bob has talked about pollutants. Maybe you can talk about, Clif, we did consider that issue in designing the form water retention system here. Knowing also that this site, the only water it does contain is the precipitation from the rain going to the site, I don't think there is a dispute on that but –

MR. SEIBER: The Township has requirements for storm water retention or storage and characteristics for the site, and this pond is sized for a hundred year storm and the runoff rate is .2 feet per second.
MR. STOEPKER: Can you tell us what that means in English?

MR. SEIBER: It means that the runoff end, the developed condition is about half of what the present development runoff is. So the pond is sized for 100 year storm or, in other words, a storm that theoretically has a one percent chance of occurring in [64]any given year. There is plenty of capacity and that also assists in removing sediment. That helps in the water quality issue too.

MR. STOEPKER: Are there any other features that are built within the system that address a sedimentation issue?

MR. SEIBER: Of course during construction there is catch basin filters provided on all the catch filters as well as a siltation fence that is maintained during the course of construction

As Bob mentioned the grease drains and for base and different items of sediment control which are incorporated as part of the storm water basin and storm water management system.

MR. STOEPKER: So from the flooding impact?

MR. SEIBER: Actually I think it would reduce the amount of flooding. The rate of flow in this county drain would be reduced after development, because this area is dug out and additional storage capacity is provided, which more than compensate for the additional impervious surface.

MR. STOEPKER: Because it exceeded the amount that is required to do that because of the 100 year floor requirement.

MR. SEIBER: And the restricted outflow [65]rates.

MR. GAUTHIER: Part of our point was right now there is no outflow. Essentially it is off-line, if you will. Once you do anything to connect it, it would be online, therefore, that will get into the drainage basin.

MR. SEIBER: I'm not sure you can say for the hundred year storm or ten year storm for that size storm event you would have no flow into that drain. We saw some low areas that kind of meander through and seem to make their way over to the drain once you had some fill in of that low area, so you get a three and a half inch storm, which would be a ten year storm. I think you would start seeing some overflow.

MR. GAUTHIER: Because it is not –

MR. STOEPKER: Right, there is not, whether they were manually created or not or hand dug there was lateral cuts, drainage cuts that run through that berm, and I think Clif's comments were right, you would have to get rain and it would have to go over that elevation. I notified three of them at least at the point where we walked and started going north on the site and I can't recall what is site.

MR. STOEPKER: The other question goes back to Bob, and that is the issue to the effect of water [66]quality. He talked about an anti-pollutant thing. One of the issues you don't have and that is somebody using fertilizer and other things, and Bob was involved in a project that was called Blue Herron which has won awards. I actually work for that association now, and we have a issue there where the neighboring lakes are taking away the lake level because of what they did and shouldn't have done. And to rectify that problem, we're going to have to connect the lakes.

MR. LEIGHTON: That was actually a required thing by the permit.

MR. STOEPKER: The problem we have with that, we have a restricted covenant at this condo association where you cannot use fertilizer and other lawn chemicals anywhere there and if that is a restrictive covenant that the department felt and we believe would be a valuable covenant to have. We would put that covenant in effect. And I raise this other development is now the other development upstream from us is not subject to those same restriction, and our concern is having their water come into our lake which is not subject to their restrictions, we're sensitive to that

issue. In fact, that is why I picked Bob to work with us on this project because he is from a pollutant standpoint that would be a potential pollutant and we [67]would put a restrictive covenant on the sale of and the development of the property, that you could not use those types of chemicals on the land. Not wetlands, whatever measures we could put to filter that out, that would go into the drain. If it is a restrictive covenant within the land, I mean that is recorded, everybody sees that and everybody that buys the units buys into that. At Blue Herron it has not deferred anybody from buying those units. They sell for a tremendous value.

MR. LEIGHTON: Those rules are really a marketing plus.

MR. DEROCHE: I wish they would do that in my neighborhood.

MR. STOEPKER: We view it that way, and so we're not just throwing that out there saying we think that would work. We know it works. We have done that and we would do that here. I think there was some questions raised about construction issues. One had to do with soil erosion. I think your response to that was you would dig – you would talk about that real quickly. This is during construction.

MR. SEIBER: One of the first things that would done is to install the siltation fence around the perimeters of the site, and once the mass grading [68]commences, this area would all be dished so that is generally drops toward the pond, so that during constructions any soil erosion of the ground surface would tend to drain towards the center and not drain out towards the

county drain, so just the method of construction would provide some assurance that erosion is maintained on the site and not allowed to release offsite.

MR. STOEPKER: That would be in addition to the silt fences that you would put up.

MR. SEIBER: Yes.

MR. STOEPKER: And that is also required by county permit.

MR. SEIBER: Yes.

MS. CHUBB: Bob's note here to me was that he reserved the room for only 15 more minutes. I don't know if there is someone waiting to use the room.

MR. DEROCHE: I know there is other people that have to catch buses today. I'm okay, but just to let people know.

MR. STOEPKER: In reference to there was a comment to page nine about the operational impact which talked about the restrictive covenant. We talked about the storm water issue. We talked about the filtration issue which does not exist now, but if you put in an [69]enhancement plan a filtration system could be installed through that.

There was a question raised about the potentiality of this as a sediment basin. It doesn't function as that now. Let's propose.

MR. LEIGHTON: Where the berm would be taken

away.

MR. STOEPKER: You would have to alter the topography of the property to do that.

MR. LEIGHTON: Without looking at the watershed, I'm not sure that would happen. Standing out there it didn't look like the drains gets that much water. If you take the upstream water and somehow capture it on the site. First of all, I don't know if there is that much water, and whether or not it ever would go over the edge of the ditch to go onto the property. I doubt it.

MR. STOEPKER: I think on page 12 of the report this gets into under the issue of biological, and I'm going to skip the points that are conceded. On page 12 it gets into this aquatic biota, and I think the issue was raised there, the potentiality for duckweed was mentioned. I don't think we have seen that on the property. There is no fish or shellfish on the site. The habitat to the extent exists as I think [70]is identified on the photographs. The understudy is largely in the upland which is non regulated, and the balance of the habitat is basically the tree canopy, and you can see that as you walk the site today.

They raise the issue of noise. He was kind enough to tell me that Indiana bats do exist near the Indianapolis airport. If they do exist and like our trees, the existence of human voice, which probably will compete with freeway noise, which would be fairly loud, I wouldn't think that would be a negative impact.

Again in reference to the habitat of the tree coverage, we'll abide by the Chesterfield Township ordinance in

reference to that, and whatever is taken down will have to be replaced in kind. Again the objective is to preserve as much as we can.

That then gets us to this last page, second to last page, page 25, and before we comment on that, it looks like there is nine categories that are summarized here, is that correct, and of the nine categories the conclusion by the department is that we satisfy six of them, is that correct?

MR. DEROCHE: That's correct.

MR. STOEPKER: And where we don't satisfy out of the nine is one, two and nine, and the first one [71]being the applicant must overcome the presumption that a practicable, less environmentally damaging alternative site, outside special, aquatic sites, exist. And I think the comments we made in the beginning is that is, in fact, the case. There is not a practicable alternative site that is available to do what we want to do. And when I'm not doing this kind of work, I do rezoning work. I could spend my entire life doing that.

If you go through the report, most of the environmental comments were, I'm paraphrasing, were marginal impacts. There was no significant impact. If you go through the environmental analysis under this, if you go to figure three, the discharge must not violate state water quality standards or Clean Water Act. They agree with us. The project must not jeopardize the continued existence of an endangered species. They agree with us. The [72]project must not cause or contribute to significant adverse effects on life stages of aquatic life and other wildlife dependent on other

ecosystems. The project must not cause or contribute to significant adverse effects on ecosystem diversity, productivity or stability. The project must not cause or contribute to significant adverse effects on recreational, aesthetic or economic values. They agree with us.

So the odd thing to me if you go through these things which points specifically to the environmental considerations of the reports and you apply that to one, I don't know how the conclusion then reads in one, there there is less environmentally damaging alternative site, when the environmental analysis that is described doesn't seem to be negative.

MS. CHUBB: Do you understand why significant has astericks?

MR. STOEPKER: If project does not comply due to this, explain if this determination differs from conclusion regarding EIS, Section IV, above. So there is a footnote down here, and the way I read it, if the project does not comply they would tell you that.

MS. CHUBB: If it is considered significant that triggers an EIS, that is what these questions are getting at.

MR. LEIGHTON: This is really a test for EIS do you understand that?

MR. GAUTHIER: It is also a test called for [73]significant degradation of the economic system.

MR. STOEPKER: I understand through my comments, if you read the report the term marginal is used all the

way through, of marginal impace.

MR. STOEPKER: Which report?

MR. DEROCHE: It is either minor or major.

MS. CHUBB: On an individual basis, and this also talk about cumulative.

MR. STOEPKER: Talking about cumulative, that issue did come up at the state hearing and Mr. Horning (phonetic) was asked to give a percentage of wetlands that had been built in the county versus wetland that was there and he couldn't do it.
MS. CHUBB: Wetland that had been lost?

MR. STOEPKER: Lost or whatever. There has been no study that he was aware of, at least at the time we identified cumulative impact.

MR. LEIGHTON: I think it is going the other way, to be honest with you. It is getting harder to find property that is not wet, and the less farming that goes on – I'll tell you what you can do. You can go out and map the sewer lines by the farming. There is a lot of violations out there, but that is not a whole a lot of permits. Especially in Macomb County, there is violations everywhere. You have one down the [74]street there. I saw a huge one. I think it is a function of the process.

MS. CHUBB: What is? I didn't follow that whole thing.

MR. LEIGHTON: If you are losing wetlands, it is because of the difficulty of the process. I think that where there aren't sewer lines and where development

pressure isn't heavy or high, it is not a proper location of development. The land is reverting to wetland. There is a gain out where the pressure doesn't exist.

MS. CHUBB: It is a reversion back. It was there, it was drained and then –

MR. LEIGHTON: Your percentage is calculating as being a loss. I don't think it is. I think it is coming back. Large acreage is reverting back to wetland. Where the loss is, is where either the law is not being followed or somehow people are slipping through the cracks or something, because the loss is where the sewer lines are and the developments occur, and the percentages you're quoting are wrong.

What you should do if you want to get a good percentage, is go out and add up all these areas of development. There is your loss. Everywhere else you're getting a gain.

MR. STOEPKER: [75]Going to item number two, there must be no alternative that is practicable, is less damaging to the aquatic ecosystem, and has no other significant adverse environmental effects. I note there is no asterick after that word significant, but we believe that what we have submitted both to the state and to the department shows that there is no practical alternative, and that, in fact, what we have proposed is not damaging to the aquatic ecosystem as it relates to this property and environment surrounding that property, and that either the enhancement or preservation alternatives meet clearly the objective of the statute and the regulations that have been adopted pursuant to that statute.

And then you go down to paragraph number nine, which is the only other one we received, all appropriate and practicable steps to minimize potential adverse effects of the discharge on the equatic system must be taken.

I think we have demonstrated that. I think what we're proposing goes to the heart and soul of at least that particular paragraph, that that is the intent – that that would be the intent of this development. That is why the preservation enhancement plans were shown, the concept of restricting the use of [76]fertilizers and that on the property, on the site, minimizing the actual grading plan, grading area to what needs to be done, the methodology constructing the plan, the oversizing of the retention pond area. The method of using the retention ponds on the site, the segregation of that from the enhancement areas of the preservation areas on the site all were done with objective of minimizing potential adverse impacts.

When you gauge that versus the nature of this particular wetland, forgetting what is around it for a minute, and that everything else is built around it, you know this is certainly, if you were to do an essential, non essential analysis of this wetland, this would fall under a non essential wetland. We think we're talking about a non essential wetland and making it better in one sense, making it function as more of a filtering wetland if the enhancement plan is actually adopted, and that is the reason for its suggestion while environmental features in the environment that meet the objectives of the statute and regulations. I mean that kind of summarizes it in a nutshell.

MS. CHUBB: You said it was a non essential wetland. How are you defining that?

MR. STOEPKER: Actually the State of Michigan within the statute, there is an essential, non[77]essential analysis that is done where you actually grade a wetland, and actually they didn't do it. We did it. They didn't do it. It was brought out. They are supposed to do that when the state does an analysis.

MS. CHUBB: As part of their application process?

MR. STOEPKER: Bob, I think you'll notice I asked them a lot of questions on it. They have a checklist-of things that they are .supposed to go through that match the stats, and it is kind of like getting the letter from the Fish and Wildlife Department, and they have not inspected the site, you know, and just making a general conclusion that this is a valuable piece of something even though they have never been here, which is what they did in this case, twice.

You know, we did not just a. cursory review, an in-depth review. It has been pending so long. If you would apply the essential, non essentially tasks, which is not found in the federal statute but it is found in the state statute, it is not an essential wildlife. I think under the enhancement plan it would be essential characteristics them so -- My voice is done.

[78]MS. CHUBB: Anything else? Last comments? Okay then. I didn't have any further questions so --

MR. STOEPKER: Bob, for the record, did you have the photocopies of these? Did you have black and whites of

these or not?

MR. DEROCHE: I have my own.

MR. STOEPKER: These were referenced in the transcripts, these photographs, but whether he had the specific ones, I can't recall, and I don't know if you want these or copies made of those or not?

MS. CHUBB: I have copies of what pictures he has.

MR. DEROCHE: Which basically show the same thing.

MR. STOEPKER: I just wanted to be clear that we were not trying to offer something that had not been referenced before.

MS. CHUBB: In terms of the site, the site is the site, unless it has been clear there is some sort of violation and then over time, over time changes, and it doesn't change in the process so

MR. STOEPKER : All right. I thank you for your time. I appreciate it very much.

MS. CHUBB: Thank you.

MEETING RECORD

FILE NUMBER: 99-250-002-1

PROJECT NAME: CARABELL CONDOS

MEETING DATE: 30 January 2001

MEETING TIME: 1:30 p.m.

MEETING PURPOSE: Appeal Conference

MEETING LOCATION: Planning Conference Room PVM Federal Building, Detroit

ATTENDEES	TITLE POSITION COMPANY PHONE
Suzanne Chubb	Division Appeal Review Officer .
Keith Carabell	Applicant
Tim Stoepker	Attorney for Applicant
Bob Leighton	Environmental Consultant for the applicant
Cliff Seiber	Engineer for the applicant
Wally Gauthier	Detroit District Regulatory Section B Branch Chief
John Ritchey	Detroit District Personnel - Observer
Pat O'Connor	Detroit District Personnel - Observer
	Bob Deroche Detroit. District Project Manager Section B
Court Reporter	

MEETING NOTES/SUMMARY: Purpose of meeting was to clarify record so the Division Review Officer could make a decision on the merits of the three points

of appeal put forward by Mr. Stoepker on behalf of Mr. Carabell. Mr. Stoepker made a presentation on the points with particular emphasis on the third point: a permit should be issued to the Carabells. He basically presented his argument, in the form of court transcripts, taken from the MDEQ contested case hearing before the state administrative law judge. Mr. Stoepker contends that no permit is required, from either state or federal agencies, and that the Corps is prohibited from making a decision when one has already been made by a "competent court".

The RO gave a timetable of March 4, 2001 for returning a decision on the matter.

ACTION REQUIRED: None

NAME OF PERSON DOCUMENTING THIS MEETING: Robert D. Deroche

SIGNATURE:

DATE: January 31. 2001

MEETING RECORD

FILE NUMBER: 99-250-002-1

PROJECT NAME: CARABELL CONDOS

MEETING DATE: 30 January 2001

MEETING TIME: 0900 hours

MEETING PURPOSE: Appeal Site Visit

MEETING LOCATION: Donner Road - Site of Project in Chesterfield Township

ATTENDEES	TITLE POSITION COMPANY PHONE
Suzanne Chubb	Division Appeal Review officer
Keith Carabell	Applicant
Tim Stoepker	Attorney for Applicant
Bob Leighton	Environmental Consultant for the applicant
Cliff Seiber	Engineer for the applicant
Steve Gallop	Representative of Congressman Bonior's Office
John Ritchey	Detroit District Personnel - Observer
Bob Deroche	Detroit. District Project Manager

MEETING NOTES/ SUMMARY: The party walked along the upland ridge that runs along the ditch along the northeast/southwest hypotenuse of the triangular-shaped property and was. created as a result of the excavation and sidecasting of the ditch materials. There

was some discussion. as to the observations that there is little in the way of understory except along that upland ridge and on the upland corners of the property, as well as along the perimeter of the woodlot. There was also a discussion as to which direction the drainage ditch flowed. I stated that on one of my visits when there was water standing in a portion of the drain, that it was flowing into Sutherland-Oemig Drain. Bob Leighton said he thought it drained the other direction. Upon studying the site plan map which Suzanne brought, it was determined that it depended on where you were at in the drain, as the elevations are inconclusive. I offered, however, that typically, a drainage system goes from smaller to larger and if you looked at the other end of the drain, I believe it goes into "nothing", perhaps draining a farmfield; whereas, if you looked at the other end; it goes into S-0 drain. We concluded the meeting at 0945 hours.

ACTION REQUIRED: None

NAME OF PERSON/DOCUMENTING THIS MEETING: Robert D. Deroche

SIGNATURE:

DATE: January 31, 2001.

MEMORANDUM FOR: ADMINISTRATIVE APPEAL CONFERENCE

FOR: KEITH & JUNE CARABELL, FILE NO. 99-250-002-1 DETROIT DISTRICT

DATE: JANUARY 30, 2001

Review Officer (RO): Suzanne Chubb." U.S Amy Corps of Engineers; Great Lakes & Ohio River Division, Cincinnati, Ohio

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226-3425.

Receipt of Appeal: December 4, 2000

Location of Appeal Conference: McNamara Federal Building, 477 Michigan Avenue, Detroit, Seventh floor conference room.

Attending Conference:

Mr. Keith Carabell, appellant
Mr. Timothy A. Stoepker, appellant representative
Mr. Robert Leighton, wetland consultant
Mr: Clif Seiber, engineering consultant
Mr. Robert Deroche, Project Manager, CELRE-CO-L, Detroit, McWgan
Mr. Walter Gauthier, Section Chief, CELRE-CO-L, Detroit, Michigan
Mr. John Ritchey, Indiana bat expert, CELRE-COL, Detroit, Michigan.
Mr. Patrick O'Connor, observer, CELRE-CO-L,

Detroit, Michigan
Ms. Suzanne Chubb, Appeal Review Officer, CELRD-CIA-0, Cincinnati, Ohio
Ms. Luey Capobianco, stenographer

Basis for Appeal:

Reason 1: The Army Corps of Engineers (Corps) has no jurisdiction over the land at issue.

Reason 2: The issues presented by the Carabell's petition were already decided by the Michigan Department of Natural Resources in favor of the Carabells, so the Corps is barred by res judicata from deciding against the Carabells.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Note: A site visit was conducted on the morning of 30 January 2001. The following individuals met at the site at 09:00 - Messrs. Carabell, Stoepker, Leighton, Seiber and Steve Gallop (asst. to Congressman David Bonior) were present for the appellant;

Messrs. Deroche and Ritchey represented the Detroit District, and myself. Mr. Carabell did not walk the site with the group.

The group began at the SW corner of the parcel, walked along the ditch to the NE corner of the parcel and then in a westerly direction to return to Donner Road. Mr. Leighton said the ditch is a man-made county drain of unknown age (perhaps fifty to sixty years old, 1940-50

timeframe). The group discussed the direction of water flow in the ditch. Mr. Leighton believed it flowed SW; Mr. Deroche observed it flowing NE during a site visit and also remarked that he thought the drainage is more "feathery" (diffuse) to the SW. A review of the spot elevations on Sheet 1, Grading plan of the project drawings, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the SW property corner is 584.50 feet U.S.G.S. datum and 584.40 feet at the NE corner. The lowest elevation is 583.90 feet, noted at two locations along the ditch northeast of the midpoint along the property line. The County Drain Commissioner's office may have the original specifications of the ditch design or road culvert invert elevations at Donner Road and the NE end to clarify this issue. Neither Mr. Leighton nor Mr. Deroche had checked on this information. The ditch may also drain in both directions if it traverses two different drainage areas or watersheds.

Conference Discussion:

The appeal conference was held between 13:35 and 15:40. After introductions, I briefly explained the purpose of the appeal conference and the appeal review process following the conference. The appellant made the following points pertaining to the aforementioned Request For Appeal.(RFA) reasons:

1.) The appellant considers the wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers. The

appellant also does not consider the ditch to be a water of the U.S. Mr. Stoepker requested the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable water. Mr. Gauthier responded that the subject wetland was adjacent to a surface tributary system to a navigable waterway (Lake St. Clair). The District did not rely on the Migratory Bird Rule. Mr. Stoepker requested the CWA citation for tributaries to navigable waters.

2.) Legal issue refer to stenographer's verbatim record. The appeal reason stems from the appellant's belief that the State of Michigan, while administering the 404 program, was acting on behalf of the federal government.

3.) Mr. Stoepker raised the following points under this reason:

a. Alternative project site (Corps letter dated 5 October 2000, page 2). The appellant investigated alternative sites within the township based upon the township's master plan and utilizing the current land zoning designations. Mr. Stoepker referenced the MDEQ contested case hearing transcripts of Mr. Patrick Meagher, planning consultant to Chesterfield, pages 157-212 (EA enclosure 14). Mr. Stoepker said Chesterfield is a built-out community meaning that the commercial and single and multi-residential areas are well established.

The appellant purchased the property in 1969, prior to Clean Water Act regulations. The site is mostly wetland. The District's letter states that "One apparent

less damaging alternative would be to purchase an upland or primarily upland, parcel of property elsewhere in the Chesterfield Township area that maybe zoned or re-zoned for multi-family residential development." Mr. Stoepker said that the District had no substantive basis for the statement since they had not conducted a study of possible sites.

In the hearing transcript for Mr. Meagher, page 166, Mr. Meagher started that, besides the project site, another undeveloped property was zoned RM-3 within Chesterfield township. Mr. Stoepker said his client did not consider this parcel in their alternatives analysis because it would mean "abandoning" the project parcel. The parcel would have cost $43,400 per acre to buy.

In 1993, the USEPA sent a letter to NIDEQ and objected to the project (130-unit proposal). A later modified proposal (112-unit proposal) was submitted to the state but not coordinated with the USEPA or CCE. A 106-unit ranch-style plan was also considered by the appellant as well as a 24-unit proposal suggested by the MDEQ.

Mr. Seiber summarized the eight different scenarios that the appellant considered in their 1998 feasibility-analysis.(EA enclosure 14).

Project Scenario	% Profit (+) or Loss (-)
112-unit condos w/offsite mitigation	- 2.26

112-unit condos w/ onsite enhancement	+ 4.79
106-unit ranch w/offsite mitigation	- 2.17
106-unit ranch w/onsite mitigation	+ 5.13
24-unit condos w/ offsite mitigation	- 16.24
24-unit condos w/ onsite enhancement	- 7.17
24-unit condos w/ offsite mitigation	- 13.8
24-unit condos w/ onsite enhancement	- 5.58

b. Mitigation, Mr. Stoepker questioned the 1.5:1 minimum mitigation ratio suggested by the USEPA (EA page 3) because there was no basis given for this ratio. He said that this ratio, when applied to 15 acres of wetland impact, is not prudent and feasible although it may be for parcels with less wetland impact.

Mr. Stoepker said the appellant is also agreeable to preservation of the remaining onsite wetland in-lieu-of the proposed enhancement mitigation plans. I asked the District representatives if they had been aware of this and they said no.

c. Wetland functions/values. Mr. Leighton spoke on his

assessment of the current wetland value. He said the onsite wetland lacks diversity and has an open understory. Understory can be found in the upland portions of the parcel. The wetland tree species are cottonwood, elm and silver maple which is characteristic of most of the forested wetlands in Macomb County. I asked Mr. Leighton if he knew what percentage of the County was comprised of various wetland habitats (emergent, scrub-shrub, forested) both historically and currently. He did not know.

Mr. Stoepker mentioned that a Public Notice consent letter had sated that the onsite wetland had a groundwater recharge function (EA page 4). Mr. Gauthier stated that groundwater recharge had not been a Corps issue.

Mr. Stoepker said the State had defined the wetland as "non-essential wetland" based on State statute/definition.

d. Water Quality. Mr. Leighton also spoke about aspects of the project design related to water quality -- onsite erosion controls during construction (silt fences and catch basins, disturbed ground sloped to drain to center of property). After construction, grease traps with storm water runoff from paved areas etc. directed to a storm water detention basin, not to the mitigation areas. The detention pond is designed for a 100-year storm event. The proposed enhancement areas would filter surface water runoff. The outflow to the ditch is 0.2 cfs, 50% less than the current runoff rate.

e. Migratory Bird Habitat. Mr. Stoepker said there was no demonstrated lack of avian habitat in the area or

that the area is vital to migratory birds.

f. Miscellaneous. Chesterfield township has a woodland preservation ordinance (reference Meagher transcript pages 209-211). The appellant is not opposed to banning the use of lawn chemicals within the development and placing deed restrictions on the remaining wetland. A ban on lawn chemicals has worked well at another existing development (the Blue Heron development).

Suzanne Chubb
Appeal Review Officer

ADMINISTRATIVE APPEAL DECISION
KEITH & JUNE CARABELL,
FILE NO. 99-250-002-1
DETROIT DISTRICT
MARCH 5, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226X425.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): December 4, 2000

Appeal Conference Date: January 30, 2001

Site Visit Date:. Same

Background Information: The .appellant proposes to construct a 112-unit townhouse condominium development on a 19.6 acre triangular-shaped parcel located in Chesterfield Township, Macomb County, Michigan. A county drain follows the hypotenuse side of the property on a northeast-southwest alignment. A small amount of upland is located in the southwest corner of the parcel and along the ditch. The appellant proposes to place fill into approximately 15.9 acres of Wetland and convert approximately 3.7 acres of forested wetland to emergent and open-water cover

types as mitigation (enhancement).

Following Michigan Department of Natural Resources (MDNR) permit reviews in 1993 and 1994 with subsequent permit denials, a Michigan Department of Environmental Quality (MDEQ) administrative law judge ruled in favor of a modified project design in September 1998 and ordered the issuance of a State permit. The United States Environmental Protection Agency (USEPA) sustained their objections to issuance of a permit and, pursuant to Section 404(j) of the Clean Water Act and 40 CFR 233.500), Section -404 permit authority was transferred from the MDEQ to the Army Corps of Engineers (Corps).

The appellant subsequently filed an application dated 19 August 1999 with the Detroit District (District). The District published a public notice (PN) on 8 February 2000 and conducted three site visits on 12 October 1999, 5 May 2000 and 2 August 2000. Following the review period, the application was denied on 5 October 2000. The appellant submitted a RFA to the Division on 4 December 2000.

Summary of Decision: I find that this RFA has no merit. The onsite wetland is regulated because it is adjacent to a tributary system of Lake St. Clair. Further, under the Clean Water Act (CWA), the permit issuance decision by the MDEQ administrative law judge does not bar Federal review and jurisdiction. The District completed a fair and reasonable review of the appellant's application in accordance with all applicable laws and regulations.

Appeal Evaluation, Findings and Instructions to the

Detroit District Engineer (DE):

Reason 1: The Corps has no jurisdiction over the land at issue.

Finding: Reason 1 of this appeal has no merit.

Action: No action required.

Discussion: The appellant considers the onsite wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers. The appellant also does not consider the onsite ditch to be waters of the United States. The appellant requested that the Corps identify the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable waters and for tributaries to navigable waters.

Under the Federal Water Pollution Control Act (FWPCA) amendments of 1972. (Public Law 92-504), Congress extended Corps regulatory jurisdiction beyond the traditional "navigable waters" to include "all waters, of the United States", including wetlands (33 U.S.C. 1362). In 1977, the FWPCA was further amended and renamed the Clean Water Act. Title 33 U.S.C. 1344 (also known as Section 404) requires a permit from the Secretary of the Army for, discharges of dredged or fill material into "all waters of the United States." The statutory authorities under which the Corps implements its regulatory program are found at.

33 CFR 320.2 and the policies, practices, and procedures followed by the Corps in connection with the review of permit applications to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 are found at 33 CFR 323.

"Waters of the U.S." include traditional navigable waters and their tributes, adjacent wetlands and isolated waters with an interstate commerce nexus. "Adjacent" means bordering, contiguous or neighboring and' includes wetlands separated from other waters of the U.S. by a man-made dike or barrier, natural river berms, beach dunes and the like (33 CFR 328). "Isolated waters" are defined as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies (33 CFR 330.2). A ditch excavated in a water of the U.S. (wetland or stream) remains a regulated water of the U.S. provided an Ordinary High Water mark is present. A ditch constructed wholly within upland is generally not a water of the U.S. (Preamble to 2000 Nationwide Permit Regulations, 65 FR 12823).

In this case, the District determined that the onsite wetland was adjacent to a surface tributary system of a navigable waterway, Lake St. Clair. Specifically, the project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St. Clair. The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils (Toledo silty clay loam, 0-2% slopes) by the U.S. Department of

Agriculture, Natural Resources Conservation Service (Macomb County Soil Survey, 1971). The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berets on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above. Construction of the ditch is thought to have occurred some fifty to sixty years ago prior to CWA jurisdiction.

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesterly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM also remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the. Southwest property corner is 584.50 feet U.S. Geological Service (USGS) datum and 584.40 feet at the northeast corner. The lowest elevation is 583.90 feet, noted at two locations along the ditch northeast of its midpoint along the property line.

Although confusing, the appellant has not presented any information to refute the District's evaluation. Furthermore, even if h assume that the ditch flows in a southwesterly direction, the USGS topographical map, New Haven quadrangle, appears to indicate that the ditch is connected to other ditches that outlet to Auvase Creek and eventually Lake St. Clair. This decision does

not prevent the appellant from, presenting new information to the District for reconsideration of then original determination.

The District also performed a site visit in May 2000 [Environmental Assessment (EA) enclosure 16] to document migratory bird use and their connection to interstate commerce. The recent U.S. Supreme Court ruling (SWANNC v. Corps) negated use of the Migratory Bird Rule to establish. an interstate commerce connection on isolated intrastate waters. The SWANNC decision is not relevant to this proposal because the subject wetlands are not isolated.

Finally, although not raised in the RFA, during the appeal conference the appellant questioned a statement made by the District in the decision document. The District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries (Auvase Creek and the Sutherland-Oemig Drain) to 23 Mile Road as it does on the Salt River, an established federally navigable waterway (EA page 6). The administrative record does not support this statement. The Ordinary. High Water elevation for Lake St. Clair is 576.3 feet International Great Lakes Datum (IGLD),1985, and the bottom elevation of the onsite ditch at the northeastern end is 583.7 feet IGLD, 85 (converted from 584.4 feet USGS Datum). This statement may be supported by bottom elevations for the nearby Sutherland-Oemig Drain but they are absent from the administrative record. However, the District's statement is irrelevant to the jurisdictional determination made by the District and to the discussion above.

Reason 2: The issues presented in the Carabell's RFA were already decided by the MDNR in favor of the Carabells, so the Corps and the USEPA are barred by res judicata from deciding against the Carabells.

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: The appellant believes that the State of Michigan, while administering the Section 404 program, was acting on behalf of the federal government. The USEPA, pursuant to Section 404(g) and 40 CFR 233, formally transferred administration of the Section 404 permit program to the State of Michigan through a Memorandum of Agreement (MOA) signed in 1983. However, under Section 4040(j), the State must still coordinate with the USEPA on certain classes and categories of activities. Because the appellant's proposed discharge of fill material exceeded 10,000 cubic yards, the subject application was not waived from the requirements of Section 404(j). The USEPA responded to the State's public notice with a letter of objection dated 4 March 1994. Regulations at 40 CFR 233.500) clearly state that if the State neither satisfies EPA's objections nor denies the permit, processing of the Section 404 permit application reverts to the Secretary of the Army, acting through the Chief of Engineers.

Following issuance of a State permit, pursuant to an administrative court order, the USEPA sent a. letter dated 23 November 1998 that sustained their. objections to the project. This effectively transferred Section 404 permitting authority to the Corps pursuant

to. the aforementioned regulations.

Res judicata is not an applicable legal principal here. There has been no preceding decision or judgment regarding this permit application in a federal forum. The State of . Michigan followed its own program procedures by conducting an. administrative hearing. The USEPA objected to the result. When the USEPA objects to the State's issuance of a permit, and the State does not revise the permit (or deny it) in accordance with the stated objections, both Section 404(j) of the CWA and 40 CFR 233.500) require the Administrator of the EPA to turn over the permit application to the Secretary of the Army so that the Secretary can process the permit application. The MOA between the State and the USEPA merely implements the statute and regulation.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Finding: Reason. 3 of this appeal has no merit:

Action: No action required.

Discussion: In the RFA, the appellant states that the primary factors in the District's denial decision are valuable seasonal habitat and water storage functions from the public interest review. While the District's 5 October 2000 letter does mention these factors, the letter also states that the denial is based on non-compliance with the USEPA's 404(b)(1) Guidelines: The presence of potential habitat and use of the site by the Indiana bat (Myotis sodalis) and possible consultation

with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act is also unresolved. Therefore, the appellant has not shown compliance with all applicable laws and regulations.

The District conducted a fair and adequate public interest review. They published a PN, considered all comments received and documented their evaluation of the applicable public interest review factors. Besides the effects on wildlife habitat and water quality, the District also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. The District did err when they stated that the proposed storm water detention basin would outlet into the proposed mitigation areas. The proposed project drawings show that the detention basin would outlet to the county ditch. This error is present under several EA headings including Operational Impacts on Water Quality, Shoreline Erosion and Accretion, Flood Hazards and Floodplain Values, and Effects on wetlands, and is implied in Effects on Aquatic Biota. However, although this misconception was a factor in the District's evaluation of the aforementioned public interest factors, this error is harmless because it, alone, is not the sole or overwhelming basis of the District's denial decision.

The District acted appropriately in finding that the appellant has not demonstrated that the proposal is the least environmentally damaging practicable alternative. A housing project is a non-water dependent activity and does not require siting in a wetland. During the State administrative hearing, Mr. Patrick Meagher, the planning consultant for Chesterfield township, stated

that, besides the project site, another undeveloped property is zoned RM-3 (multifamily development) within Chesterfield township (Transcript page 166). At the appeal conference, the appellant stated that this parcel was not considered in their alternatives analysis because it would mean "abandoning" the project parcel. The appellant only examined on-site alternatives and those did not- result in a measurable decrease in wetland impacts. Additional properties may also be available if re-zoned for RM-3 development. A permit cannot be issued when a less environmentally damaging practicable alternative exists or when insufficient information is provided to determine compliance. (40 CFR 230.12(a)(3)].

Although the appellant has not demonstrated avoidance and minimization of aquatic impacts, the District also determined that the proposed mitigation was inadequate. They found that the conversion of 3.7 acres of onsite forested wetland to emergent and open water cover types would not replace the wetland function's lost due to the proposed fill activities. The District did not consider alternative mitigation proposals that may be acceptable because earlier steps in the Guidelines sequence (avoidance and minimization) had not been adequately addressed. The appellant bears the burden of proof to demonstrate compliance with the Guidelines.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request For Appeal do not have merit.

ROBERT H. GRIFFIN
Brigadier General, U.S. Army Commanding

Supreme Court, U.S.
FILED
DEC 2 - 2005
OFFICE OF THE CLERK

No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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PETITION FOR WRIT FILED APRIL 11, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

QUESTIONS PRESENTED

I. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

II. Do the limits on Congress' authority to regulate activities that substantially affect interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

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JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 27, 2004. That court denied the petition for rehearing *en banc* on January 10, 2005. Petitioners timely filed their petition for a writ of certiorari on April 11, 2005, and this Court granted the petition in an order of October 11, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The United States Constitution provides that Congress has the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides, in relevant part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (7) The term "navigable waters" means the waters of the Untied States, including territorial seas.

33 U.S.C. § 1362(7) (CWA § 502(7)).

Federal regulations define "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters, including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or